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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Does the Tax Injunction Act, 28 U.S.C. § 1341, deprive federal district courts of jurisdiction to enjoin enforcement of a provision of a New York State tax law when the effect of the injunction would be to terminate the assessment, levy, and collection of the tax?

2. Did the Energy Policy and Conservation Act of 1975 and the revocation, pursuant to its terms, by the Department of Energy of regulations that had set maximum allowable prices for certain petroleum products, prohibit the states from fixing the economic burden of a tax imposed upon companies that sell petroleum products?

3. Did those federal regulations, when they were effective, prevent the states from exercising such a power?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Temporary Emergency Court of Appeals are listed in the caption.

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DECISIONS OF THE COURTS BELOW

The decision of the Temporary Emergency Court of Appeals, dated June 10, 1981, is reported at [Current Binder] *Energy Management* (CCH) ¶ 9772 and is reprinted in the Appendix ("Apdx.") at pages 1a-10a. The decision of the United States Court of Appeals for the Second Circuit, dated January 28, 1981, is reported at 639 F.2d 912 and at [Current Binder] *Energy Management* (CCH) ¶ 9765, and is reprinted at Apdx. 16a-27a. The decision of the United States District Court for the Northern District of New York, dated September 19, 1980, is reported at 499 F. Supp. 888 and is reprinted at Apdx. 28a-66a.

JURISDICTIONAL BASIS OF THIS APPEAL

Appellees assert that the federal courts have jurisdiction over these actions pursuant to §§ 210(a) and 211(a) of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note, and 28 U.S.C. §§ 1331, 1337, 2201 and 2202. This appeal is from a final judgment entered on June 15, 1981 pursuant to the decision of the Temporary Emergency Court of Appeals ("TECA"). A notice of appeal was filed with the Clerk of that court on June 30, 1981.

TECA held that a state statute, on the validity of which appellants rely, is invalid as repugnant to the Constitution and laws of the United States. We believe that this Court therefore has jurisdiction of this appeal by virtue of 28 U.S.C. § 1254(2).

Appellees have indicated, in opposing a stay of the TECA judgment, that they will contest § 1254(2) jurisdiction. They contend that § 1254(2) does not apply to decisions by TECA because § 211(g) of ESA, the statute establishing TECA, provides for *certiorari* in "any" TECA case and does not mention appeal. We believe jurisdiction by appeal nevertheless exists. Section § 1254(1) of 28 U.S.C. similarly provides for *certiorari* in "any" case in the "courts of appeals"; obviously, that does

not diminish the fact that in some cases—such as this one—an appeal may also be taken from the "courts of appeals" under § 1254(2). Nothing in § 211(g) of ESA or in its legislative history suggests that, by providing specific rules for the review of TECA decisions by *certiorari*, § 211(g) intended to foreclose the ordinary right Supreme Court review of a federal decision holding a state statute unconstitutional. On the contrary, the legislative history suggests that in § 211(g) Congress intended merely to expedite the review process. S. Rep. No. 507, 92d Cong., 1st Sess., *reprinted in* [1971] *U.S. Code Cong. & Ad. News* 2283, 2294.

With one narrow exception not here relevant, TECA has the same functions and powers as the other courts of appeals. ESA § 211(b)(1); *Quincy Oil Inc.* v. *FEA*, 620 F.2d 890, 893 (Temp. Emer. 1980). It is logical to conclude that Congress intended that, except to the extent it provided otherwise, the provisions for Supreme Court review would apply to TECA decisions in the same manner as to decisions of the other courts of appeals.

Section 1254(2) embodies Congress's conviction that, because the most sensitive problems of federalism are raised whenever a federal court strikes down a state statute, the statute should not finally be denied effect without review by the Supreme Court. The original draft of the Judges' Bill of 1925, restricting the previously broad appellate jurisdiction of the Supreme Court, aroused opposition because it did not provide for mandatory Supreme Court review of federal decisions holding state statutes unconstitutional. Senator Claude A. Swanson of Virginia suggested "that we possibly can get this bill through" if it would provide, *inter alia*, for an appeal as of right from decisions holding state laws invalid as against federal law. It should be "imperative," he said, that a state law could not be "nullified except by the Supreme Court." This was because "the best work the Supreme Court can do is in connection with far-reaching questions like that which go to the very structure of our Government and ought to be passed on by the Supreme Court." 66 Cong. Rec. 2757 (1925). As a result, the bill was amended to include a clause substantially the same as the current § 1254(2).

In deference to the policy behind § 1254(2), this Court accords special respect to those cases in which a federal court of appeals has declared the statute of a sovereign state unconstitutional, thus raising sensitive issues of federal-state relations. A case coming within § 1254(2) may not be dismissed for failure to present "a substantial federal question," Sup. Ct. Rule 16.1(b); when a federal court of appeals has declared a state statute unconstitutional, a substantial federal question is presented *ipso facto*.

Plainly, the policy behind § 1254(2) is equally applicable whether the decision against the state law is made by TECA—which is of course denominated a "Court of Appeals"—or by one of the circuit courts of appeals.* There is, therefore, no policy reason why § 1254(2) should not be held applicable to TECA decisions. Nor is there any practical reason. This case does not raise the concern that has sometimes led to narrow construction of the Court's appellate jurisdiction, *see, e.g., Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 & n.16 (1974)—the prospect that a holding of jurisdiction would open the floodgates to numerous appeals of a similar nature. On the contrary, this is, so far as we are aware, the only case in which TECA has ever held a state statute unconstitutional.**

Even if § 1254(2) be held technically inapplicable, the policy that a state statute should not be finally nullified without Supreme Court review still has force. If the Court holds that this appeal is improvidently taken, and acts on this jurisdictional statement as a petition for *certiorari* pursuant to 28 U.S.C. § 2103 and ESA § 211(g), that policy is a compelling factor calling for grant of the writ.

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* Indeed, the policy has had broader application. For example, until the old circuit courts were abolished in 1911, their decisions holding state statutes unconstitutional were appealable as of right to the Supreme Court. *See* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 41, 1539-41 (2d ed. 1973).

** This is probably because the provisions of ESA §§ 210 and 211 relating to exclusive federal jurisdiction over certain cases do not apply to actions claiming the invalidity of state laws. *See* Part II.B *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal raises questions concerning (a) the jurisdiction of the federal district courts over these actions under the Tax Injunction Act, 28 U.S.C. § 1341, and the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, and (b) the validity of a portion of New York Tax Law § 182 under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, and federal statutes,* regulations,** and orders related to the regulation and deregulation of prices for petroleum products. The text of these authorities, insofar as presently pertinent, is set out in the Appendix.

STATEMENT OF THE CASE

The plaintiff-appellees are ten oil refiners, who seek on various grounds to enjoin the defendant-appellants, New York State officials ("the State"), from enforcing a provision of a New York gross receipt tax that bars appellees from passing through the cost of the tax to their New York customers (the "passthrough prohibition"). New York's Legislature has decided that this provision is an essential element of the tax statute. If the passthrough prohibition becomes ineffective, therefore, the statute provides that the tax will cease to accrue.

TECA, affirming the District Court, held that the passthrough prohibition is preempted by the Emergency Petroleum Allocation Act (EPAA), as amended, by regulations promulgated thereunder, *and* by the revocation of those regulations. TECA indicated that this preemption would last until September 30, 1981, when EPAA expires. This preemption

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* Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, *as amended by* the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 15 U.S.C. § 751, *et seq.*

** Petroleum Price Regulations, 10 C.F.R. § 212.83.

holding, which affects a tax deemed essential to New York's vital interests, has plunged New York's financing into disarray and raised highly sensitive questions of federal-state relations.

STATEMENT OF FACTS

A. The New York Tax

In June 1980, New York State, o meet pressing revenue needs of its public transportation systems, imposed on certain oil companies a tax of 2% of that portion of their gross revenues allocable to New York. N.Y.L. 1980, chs. 271, 272, *reprinted in* Apdx. 81a-102a. The Legislature considered the oil companies to be an appropriate source of additional revenue because they had recently benefited to an extraordinary degree from an unusual international commercial situation, rather than from their own skill, management and efficiency. L. 1980, ch. 272, § 1, Apdx. 96a. Desiring that the tax in fact be borne by the oil companies, its intended objects, rather than by consumers, the Legislature expressly provided that the tax was a liability of the companies and prohibited the companies from passing on the cost of the tax in the prices of their products sold in New York.* N.Y. Tax L. § 182(12)(a), *as added by* L. 1980, ch. 271, § 3, Apdx. 88a-89a. So vital was this passthrough prohibition to the tax policy of the State that the Legislature provided that, if an injunction against enforcement of the prohibition were to become effective, the tax itself would cease to have effect ten days later; tax liability accruing up to that time, however, would be left undisturbed. L. 1980, ch. 271, §§ 12(a), (b), (d) *as added by* L. 1980, ch. 272, § 5, Apdx. 99a-100a.

B. Federal Regulation and Deregulation of Petroleum Prices

From 1973 to 1981, the federal government made an extraordinary temporary intervention into the field of petroleum pricing. Neither in entering the field nor in leaving it did the

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* The Act does not otherwise purport to affect the pricing of petroleum products.

federal government indicate that it intended to eradicate pre-existing state powers, especially the power to determine who should bear the burden of a state tax.

1. EPAA—The 1973 Act

EPAA was passed in 1973 in response to the grave petroleum shortages and unreasonably high price levels caused by the Arab oil embargo that grew out of the Yom Kippur War. EPAA § 2, 15 U.S.C. § 751(a). Congress directed the President or his delegate—now the Secretary of Energy—to promulgate a regulation concerning the allocation and pricing of petroleum products. EPAA § 4, 15 U.S.C. § 753.

Among the objectives that the regulation was to seek was the establishment of "equitable prices." EPAA § 4(b)(1)(F), 15 U.S.C. § 753 (b)(1)(F). That is, it was intended "to prevent price gouging [, . . .] which might otherwise occur on the basis of current shortages." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] *U.S. Code Cong. & Ad. News,* 2688, 2702.

EPAA itself, however, has no operative impact on petroleum prices. Rather, it merely sets forth various policy objectives, such as the establishment of "equitable prices," and then gives the President or his delegate "broad regulatory discretion" to formulate rules for the achievement of those objectives. *Consumer Union of the United States, Inc.* v. *Sawhill,* 525 F.2d 1068, 1077 (Temp. Emer. 1975). "[T]he Congressional intent was to hew a sphere of responsibility within which [the President's delegate] could decide how to proceed against the crisis." *Id.* The House Commerce Committee placed special emphasis on this point.

> *First,* the Committee has not attempted to fashion a mandatory allocation provision of its own conception . . . . Administrative flexibility is a prerequisite and, consequently, the Committee has decided to recommend that the Executive be assigned the responsibility for crafting the program pursuant to Congressionally defined (though generally stated) objectives.

H.R. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] *U.S. Code Cong. & Ad. News* 2582, 2589 (emphasis in original).

In enacting this emergency legislation, Congress made clear that it was granting the President only "specific temporary authority" to regulate, EPAA § 2(b), 15 U.S.C. § 751(b), and that it intended to deprive the states of their pre-existing powers only when state actions were "in conflict with" the *regulation* issued under § 4. The statute itself did not have any declared preemptive effect. EPPA 6(b), 15 U.S.C § 755(b). In enacting a very narrow preemptive standard, *contrast* Natural Gas Policy Act of 1978, § 205(d), 15 U.S.C § 3345(d), Congress left unaffected state programs that did not create such a conflict.

Thus, neither EPAA itself nor its policies suggest any rule with respect to the validity of state laws that may have an impact on petroleum prices. Because Congress gave the President and his delegate "the responsibility for crafting the [federal regulatory] program," and provided for preemption only when state action conflicted with the regulation to be adopted, the President and his delegate were given the power either to preempt or to preserve any such state law. Neither result can be considered contrary to the act itself or to its policies. The question is whether New York's law conflicts with the regulation.

The price regulation that was adopted for refiners, a classification including all the plaintiffs in these actions, was set forth in 10 C.F.R. § 212.83. This regulation established "maximum allowable prices" that refiners were *prohibited* from exceeding for certain petroleum products. Nothing in the regulation gave the refiners a *right* to charge their customers the ceiling price if doing so was in violation of state law. Nothing in the regulation suggested that it intended to override states' powers to determine the incidence of its own taxes.

Had the federal regulators so intended, it would have been a simple enough matter to include one extra sentence in the regulations, saying in substance, "Notwithstanding any state or

local law or regulation, a refiner may charge any class of purchasers a price for a covered product equal to the maximum allowable price." No such provision was included.

2. EPCA—The 1975 Amendments

In 1975 Congress reviewed federal energy policy and amended EPAA in the Energy Policy and Conservation Act ("EPCA"). Finding that, for many petroluem products covered by EPAA, the acute shortages of 1973 no longer existed, Congress established procedures for the President or his delegate to follow if they wished to amend the price regulations to exempt a particular petroleum product. EPCA § 12, 15 U.S.C. § 760a. The preemption provision of EPAA, § 6(b), was left unchanged. In promulgating an amendment, therefore, the administrators could, as before, either preempt or preserve a state law. After issuing an exempting amendment, the President retains standby authority—which has never been exercised—to reinstitute price controls, until September 30, 1981. On that date his authority to establish maximum prices of petroleum products terminates. EPCA § 18, 15 U.S.C. § 760g.

Congress enacted the 1975 amendments to foster a "gradual return" to deregulation of the petroleum industry. H.R. Rep. No. 340, 94th Cong., 1st Sess. 55, *reprinted in* [1975] *U.S. Code Cong. & Ad. News.* 1762, 1817. It wished, that is, to begin restoration of the *status quo ante*—a status that included extensive state powers. Nothing in the statute or its legislative history supports the inference that, by gradually phasing out an extraordinary and temporary exercise of federal power over prices, Congress wished to eradicate pre-existing state authority, especially authority concerning the incidence of a tax. Certainly Congress certainly never said so.*

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* The 1975 deregulation legislation does contain rhetoric extolling the free market system, but not a word was said concerning state powers, let alone preemption of state tax laws. Indeed, the only reference to state powers in either the 1973 or 1975 legislative debates was a statement by Senator Jackson in 1973 urging federal action to prevent the dangers of "piecemeal action by the States." 119 Cong. Rec. 17764 (1973). This concern was reflected in § 6(b) of EPAA, preempting state laws in conflict with the regulations.

3. Federal Deregulation of Petroleum Prices

After passage of EPCA in 1975, the federal government steadily withdrew from the regulation of petroleum prices. Indeed, by the effective date of the New York tax most petroleum products (about 65% of the oil products sold in New York) had already been exempted from federal price regulations. Even with respect to the remaining products, there was at all relevant times a material question of fact as to whether the controls had any impact on the prices charged by appellees for regulated products, for soft demand prevented refiners from charging prices near the federally-allowed maximums.

Finally, on January 28, 1981, the President, by Executive Order, ordered the immediate exemption of all petroleum products from federal price regulations. 46 Fed. Reg. 9909. Except for the President's standby authority, which will expire before the Court's Term begins, the federal Government has, for all practical purposes, withdrawn completely from the field of petroleum price regulation.

PRIOR PROCEEDINGS

These actions, seeking on various grounds a declaration and an injunction against the passthrough prohibition, were brought in July 1980 in the United States District Court for the Northern District of New York. The State moved to dismiss under 28 U.S.C. § 1341 for lack of federal jurisdiction. Section 1341, the Tax Injunction Act, denies federal district courts jurisdiction to enjoin the "assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Because enjoining enforcement of the passthrough prohibition would necessarily prevent collection of the tax itself, these actions are, we believe, barred by § 1341.

The District Court denied defendants' motion to dismiss and granted plaintiffs' motions for summary judgment on preemp-

tion grounds. The judgment has, however, been continuously stayed since its entry, first by the District Court and then by the United States Court of Appeals for the Second Circuit and by TECA.

Because appellate jurisdiction in cases involving certain EPAA-related issues has been held to be bifurcated, the State took appeals both to the Second Circuit and to TECA. Following its usual procedure, TECA postponed its proceedings pending resolution of the Second Circuit appeal. On January 28, 1981, the Second Circuit affirmed the District Court's holding that the federal courts have jurisdiction over these actions.* The Second Circuit held, however, that TECA had appellate jurisdiction over the preemption issue.

The State therefore pursued before TECA its appeal on that issue. On June 15, 1981, TECA affirmed the judgment of the District Court, but stated that the preemption would last only until September 30, 1981, when EPAA expires. The State now appeals from the judgment of TECA. As part of its appeal, the State continues to challenge the existence of federal jurisdiction.

I.

THE PRACTICAL CONSEQUENCES OF THE DECISION BELOW WILL BE SIGNIFICANT AND SEVERE FOR NEW YORK, ITS PUBLIC TRANSPORTATION FACILITIES AND ITS CONSUMERS.

A. If the TECA Decision Is Allowed to Stand, a Large Amount of Tax Liability Will Be Passed Through to New York's Consumers, Contrary to Legislative Intent.

If the TECA decision stands, the oil companies will be allowed to pass through to their customers the large sum of tax liability—estimated to be in excess of $200 million—that has

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* The State petitioned for certiorari from this decision. The Court denied the petition on June 22, 1981. 49 U.S.L.W. 3954 (No. 80-1864).

already accrued. Because virtually all of the oil companies now operating in New York have been subject to the tax, competitive forces should not make it difficult for them to pass through, over a period of years if necessary, at least a significant portion of that liability; indeed, it appears that at least one of the oil companies, New England Petroleum Corp. (NEPCO), has contracts that would, if the statute's bar were lifted, give it a right to pass through its tax costs to its customers.

Accordingly, New York's consumers would be forced to bear the burden of millions of dollars of tax liability, a burden that New York State has carefully and specifically provided should be borne by the oil companies instead. This alone is a crucial effect of the TECA decision and makes it inappropriate for this Court to allow that decision to stand without giving it plenary consideration.

B. The TECA Decision Disrupts the Finances of New York State.

If the TECA decision becomes effective, it would cause extreme disruption for the finances of the State and its public transportation systems. Indeed, the uncertainties caused by the TECA decision have already had a harmful effect.

At least two of the plaintiff oil companies have brought state court actions to nullify all previously-accrued tax liability, based upon the determination in these cases that the passthrough prohibition is preempted. *Mobil Oil Corp.* v. *Tully,* No. 10524-80 (Sup. Ct. Albany Co.) ("Mobil Albany Action"); *New England Petroleum Corp.* v. *State of New York,* No. 2913-81 (Sup. Ct. Albany Co.) ("NEPCO Albany Action"). They have maintained that, as a constitutionally-mandated consequence of that declaration, the previously-accrued tax liability must be nullified, notwithstanding the explicit language of New York's statute to the contrary. In TECA, the other appellees stated that they too may base similar state court claims upon the declaration against the

passthrough prohibition, if that declaration is upheld. *Joint Brief of Plaintiffs-Appellees* at 22 n.17.

Should such claims prevail, they would cause the abrupt cancellation of the approximately $350 million tax liability accrued up to September 30, 1981 (when, according to TECA, the conflict with federal law will no longer exist). Thus, if appellees' contentions prevail, the State would be forced to return the tax money already collected—approximately $175 million at this writing—and forego collecting the remaining $175 million, which is or will become due but which the oil companies have not paid.

Plainly, such a result would have—and the mere possibility of it already has had—a grave impact on the State's finances. It is no answer to argue that the State can devise a new plan to close the operating deficit of its public transportation facilities. Any such plan would require the State to alter its fiscal policy and divert needed revenues from other important uses or raise additional revenues from hardpressed sources. No substitute program can be a satisfactory alternative for the tax that the State has chosen as the most appropriate method of accomplishing its objectives.

Moreover, there is the possibility that the impact of the TECA decision will not be limited to tax liability accruing on or before September 30, 1981. After that decision, the oil companies asserted before TECA that (1) preemption will continue after September 30, 1981, and (2) the New York statute "has already self-destructed" and can be "resurrect[ed]" only by the decision of "a court of final appellate review." *Joint Memorandum in Opposition to Appellants' Motion for a Stay Pending Appeal* at 4 n. & 14-15 n.

The State believes that these contentions are plainly without merit. But the issue should not remain in doubt. It would be unfortunate if the continued validity of New York's tax were to remain suspended in uncertainty because this Court declined to give this case, and all its ramifications, plenary consideration, or if the tax, which is vital to a sovereign State, were to die on the basis of a decision by a lower federal court.

II.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The crucial underpinning of the decisions of all three lower federal courts, on both the jurisdictional and preemption issues, was that New York's passthrough prohibition is not an exercise of the tax power but rather a price-regulating exercise of the police power. Apdx. 38a-39a (N.D.N.Y.), 26a-27a (2d Cir.), 7a (TECA). Thus, the courts concluded that § 1341, the Tax Injunction Act, does not apply, and that New York's law conflicts with the price-regulating goals of EPAA. If the Court gives this case plenary consideration, we will present the following arguments, which here we can only outline, to challenge the basic premise of the courts below.

—The appropriate question is not what power the State was exercising, but whether New York's passthrough prohibition is a proper and integral element of a tax statute.

—It is a proper element of a tax statute not only to select the immediate taxpayer, *e.g.*, *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526-27 (1959), but also to allocate the ultimate economic burden—*i.e.*, to provide whether or not the tax may or must be passed on. *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339, 347-48 (1968) ("indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser"); *accord, e.g., United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 607-08 (1975).

—Such authority is an implied element of the taxing power, for it is necessary to make effective and significant the State's choice of taxpayer, *see McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 408 (1819).

—The States have exercised this authority many times in tax statutes. Sometimes, for example, they require a seller to pass through to his purchaser the cost of, or a refund of, a tax imposed on the seller. *E.g.*, 64H Mass. Gen. L. Ann. §§ 2, 3, 23; N.Y. Tax. L. § 1139(a).

—Two appellees have asserted in state court that the passthrough prohibition and the impost of the tax were passed for "a single objective—to have a tax which could not be passed through." *Memorandum in Support of Summary Judgment Motion* in Mobil Albany Action, p. 23; *accord, e.g., Memorandum in Support of Summary Judgment Motion* in NEPCO Albany Action, p. 12 ("the linkage between the tax and the anti-pass-through provision is patent and inescapable"; "part[s] of a single scheme"). These oil companies have thus taken a position in direct conflict with the one for which they have argued in these actions, and which underlies the lower court decisions in their favor. *See* Apdx. 36a ("Defendants describe the tax and the anti-pass through provision as a 'single entity' . . . . Plaintiffs, on the other hand, argue that the anti-pass through provision is a . . . measure separate from the tax itself.")(N.D.N.Y.).

—It would be capricious, as NEPCO has asserted, for the Legislature to attempt to regulate prices by singling out for attention one small cost, its own tax. Because the Legislature may not be presumed to have acted capriciously, its aim was not to regulate prices but to direct the incidence of that tax.

—The passthrough prohibition, as at least one of the oil companies has conceded, has no possible independent operation or meaning apart from the tax itself. NEPCO *Memorandum in Support of Summary Judgment* in Albany Action, p. 12 n.6 ("the anti-pass through provision is a wholly meaningless set of words apart from the tax it prohibits from being passed through") (emphasis deleted).

—New York's passthrough prohibition is not a price control statute enacted under the police power; it does not even occupy the same field as the now-revoked federal price control program. Its only effect is to fix the actual incidence of the gross receipts tax on the taxpayer. It does not set, nor provide any mechanism for setting, price levels for petroleum products. It does not prevent the oil companies from charging the market level for petroleum products, whether that level be 10¢ or $10

per gallon. In these circumstances, language from legislative findings, relied upon by the three lower courts, cannot transform a statute fixing tax incidence into a price-fixing exercise of the police power in conflict with federal price regulations. *See Hughes* v. *Oklahoma,* 441 U.S. 322, 336 (1979) ("practical impact" of statute, rather than legislature's description or characterization, is determinative).

—As NEPCO has pointed out below, New York has in fact resisted the responsibility to regulate petroleum prices, because at the present time it does not have either the experience or the administrative machinery to do so.

Notwithstanding all these considerations, federal jurisdiction has been upheld, and the State's law held invalid, on a view of that law that is contrary to the State's own, as well as to common sense. This Court should recognize New York's passthrough prohibition for what it is: a valid exercise of the State's authority to determine the actual incidence of a tax, and nothing more. But even if the Court regards the passthrough prohibition as an exercise of the police power, we believe for reasons summarized below that there is no federal jurisdiction and that New York's law does not conflict with the federal regulations.

A. The Tax Injunction Act Divests The Federal District Courts Of Jurisdiction Of These Cases.

1. These Actions Fall Within the Scope of the Act Because They Seek in Effect to Restrain the Assessment, Levy and Collection of a State Tax.

As the District Court noted, if the appellees are successful in this litigation, "there is no question but that the gross receipts tax . . . would cease to be in effect" and that the New York tax could not be "assessed, levied or collected." Apdx. 36a. Nevertheless, the District Court and the Second Circuit both held that the jurisdictional bar of § 1341 does not apply to these actions because they merely challenge the anti-

passthrough provision and not the tax itself. Apdx. 38a (N.D.N.Y.), 27a (2d Cir.).*

As we have demonstrated, the passthrough prohibition is an integral element of the tax statute. Because the fall of the prohibition inevitably causes the tax itself to fall prospectively, an injunction against the prohibition is necessarily a restraint against collection of the tax itself. In addition, the companies have maintained in their state court actions that, as a constitutionally-mandated consequence of the lower federal court decisions, *all* liability under the tax statute, retrospective as well as prospective, must be nullified, notwithstanding the explicit language of the statute to the contrary. This action is thus clearly—and doubly—an action seeking to restrain collection of the tax.

If plenary consideration is granted, we shall develop this argument more fully by making the following points:

—The Second Circuit's decision disregards the overriding principles of federalism underlying the Tax Injunction Act. In violation of the letter and spirit of the statute, it thrusts the federal courts into a forbidden role—interfering by injunction with state taxation. *E.g.*, *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976) (§ 1341 "has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations").

—The Second Circuit's decision conflicts with the well-established doctrine developed in other circuits that, where "there is a direct relationship between the enforcement of [a statutory provision] and the amount of taxes collected," § 1341

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* The Second Circuit found significant a statement by appellant Tully in support of a stay motion that the oil companies "do not challenge the imposition of tax" in these actions. But Commissioner Tully, in seeking to rebut appellees' objection that the tax would continue to accrue during the stay, was only reminding the appellees that they did not purport to challenge the tax itself. He was not withdrawing the State's consistent assertion, made from the very outset of this litigation, that these are in effect actions against the tax itself, and no one at the time—including the Second Circuit—so construed his statement.

forbids the federal courts to enjoin the statutory provision. *Mandel* v. *Hutchinson*, 336 F. Supp. 772, 779 (C.D. Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974) (§ 1341 held applicable to residency requirement for state tax exemption). In such a case, "to grant plaintiffs the relief they request . . . would *in effect* be enjoining the collection of [state] taxes." *Czajkowski* v. *Illinois*, 460 F. Supp. 1265, 1272 (N.D. Ill. 1977), *aff'd*, 588 F.2d 839 (7th Cir. 1978) (emphasis added) (§ 1341 held applicable to methods and procedures used for collection of state tax).

2. Appellees Have a "Plain, Speedy and Efficient Remedy" In The Courts of New York State.

Appellees argued in the alternative that § 1341 cannot apply to these actions because the federal district courts are vested with exclusive original jurisdiction over them pursuant to § 211(a) of ESA, which is incorporated to a narrow extent by § 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1). Accordingly, appellees argue, they do not have a "plain, speedy and efficient remedy" in the New York courts.

Because neither the District Court nor the Second Circuit reached this issue, we will not discuss in detail the reasons demonstrating why the state courts are not deprived of jurisdiction over a suit that claims, *inter alia*, preemption of a state law by EPAA. The tenuousness of appellees' argument is demonstrated by the fact that in at least five cases certain of these same oil companies have brought actions in state court challenging state laws as preempted by the same set of regulations that is involved here. Mobil Albany Action; NEPCO Albany Action; *New England Petroleum Corp.* v. *County of Suffolk*, 52 A.D.2d 926, 383 N.Y.S.2d 405 (2d Dept. 1976); *Governor of Maryland* v. *Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978); *Atlantic Richfield Co.* v. *Tribbitt*, 399 A.2d 535 (Del. Ch. 1977). Indeed, two of those actions are among the ones currently pending in New York in which the oil companies have challenged precisely the same tax statute as is involved here. Mobil Albany Action; NEPCO Albany Action. In all five cases, the state courts have accepted jurisdiction.

Moreover, this Court recently decided another case from state court, *Commonwealth Edison Co.* v. *State of Montana*, 49 U.S.L.W. 4957 (U.S. July 2, 1981), in which, as here, a state tax was challenged on numerous grounds, among them preemption by EPAA. *See Commonwealth Edison Co.* v. *State*, 615 P.2d 847, 859 (Mont. 1980). Neither the Montana courts nor this Court doubted the state court's jurisdiction. Nor was there any reason to. Congress never gave any indication that it intended the grant of exclusive jurisdiction, which must be narrowly construed, *cf. City of Baton Rouge* v. *United States Environmental Protection Agency*, 620 F.2d 478, 480 (5th Cir. 1980); *Texaco Inc.* v. *Department of Energy*, 616 F.2d 1193, 1197 (Temp. Emer. 1979), to apply to preemption cases arising under § 6(b) of EPAA.

B. The TECA Decision Gives Inadequate Deference To The Principles Governing Preemption, To The Statutory Preemption Standard, And To The Opinions Of The Department Of Energy, Which Wrote The Regulations Claimed To Be Preemptive.

TECA barely acknowledged, and gave little heed to, the principles that this Court has established for deciding the sensitive question of whether a State law has been superseded. As the Court has held many times,

> federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 142 (1963); *accord, e.g., Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 101 S.Ct. 1124, 1130 (1981). There is to be no preemption, in other words, "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

TECA did not suggest that Congress has, until September 30, 1981, completely foreclosed state legislation that might affect petroleum prices. Rather, TECA held that New York's anti-passthrough provision conflicts with federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). There were several fundamental flaws in the analytical framework used by TECA in applying this test. We outline these errors below, and shall discuss them more fully if plenary consideration is granted.

1. In a preemption case, "the proper approach is to reconcile" the federal and state schemes. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973); only where the conflict is "irreconcilable," *Florida Lime, supra*, 373 U.S. at 146, should state law be overridden. Moreover, the conflict must be "actual" and immediate, not merely distant and hypothetical. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960); *Goldstein* v. *California*, 412 U.S. 546, 554-55 (1973); *Hines, supra*, 312 U.S. at 67 (preemption must be shown in "the circumstances of this particular case").

TECA made no apparent attempt to reconcile the federal and state schemes; it made no attempt, for example, to determine whether the federal statute and regulation could plausibly be construed to tolerate state laws bearing on petroleum prices and to accommodate, rather than override, state laws affecting tax incidence. Nor did it make any apparent effort to determine whether the supposed conflict, with a soon-to-expire federal regulation that had lost all effectiveness, was a matter of reality or only of theory.

2. TECA did not accord any significance to the preemption provision of EPAA, § 6(b), 15 U.S.C. § 755(b). That section, limiting preemption to cases of "conflict with" regulations or orders issued under EPAA, stands in stark contrast to the preemption clauses of other statutes. ERISA, for example, supersedes "any and all state laws insofar as they may now or

hereafter relate to" covered pension plans. 29 U.S.C. § 1144(a). By contrast, § 6(b) makes clear that in EPAA, as in pre-ERISA pension legislation, Congress "envisioned the exercise of state regulation over [the covered subject matter]." *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S.Ct. 1895, 1906 (1981), *quoting Malone* v. *White Motor Corp.*, 435 U.S. 497, 514 (1978) (plurality opinion).

Congress, in other words, recognized that some state laws bearing on petroleum prices would not be "in conflict with" regulations or orders issued under EPAA and would be preserved. TECA ignored this plain fact. Consistently applied, its opinion would invalidate any state law relating to petroleum prices. The *sub rosa* effect of the TECA decision, then, is to exclude the states from the field completely, even though that was manifestly not Congress' intent.

3. TECA misunderstood another important aspect of § 6(b). In contrast to most other preemption statutes, *e.g.*, 15 U.S.C. § 78bb(a), § 6(b) does not provide for preemption by the substantive terms of the statute itself but only by regulations or orders issued under it. Clearly, this is because, as explained above, the statute itself has no operative impact. The statute merely gives the Executive the responsibility for "crafting the program" in accord with broad policy objectives. But "general expressions of 'national policy' " cannot justify preemption of a state law; that requires "focused allegations concerning alleged conflicts between the state law and specific provisions of [federal law]." *Commonwealth Edison Co.* v. *Montana, supra,* 49 U.S.L.W. at 4964 & n.21. In this case, the only such provisions that could have a preemptive effect are contained in the regulations promulgated by the federal administrators.

It is long-accepted law that, since an act of Congress cannot preempt state law in the absence of a "clearly manifested" intent, an administrative regulation cannot do so "unless, and except so far as, it conforms to a high standard of certainty." *Illinois Central Railroad Co.* v. *State Public Utilities Commis-*

sion of Illinois, 245 U.S. 493, 510 (1918). This is especially so here, where DOE could, if it wished to, demonstrate in one sentence a preemptive intent, *see* pp. 7-8 *supra.* The SEC did this recently, resolving with one stroke of the pen all doubts about its intention to preempt certain state takeover laws. 44 Fed. Reg. 70329-30 (Dec. 6, 1979) (rule makes conflict with state statutes "direct and substantial"); *see, e.g., MITE Corp.* v. *Dixon,* 633 F.2d 486, 499 n.25 (7th Cir. 1980); *AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929, 933-34 n.4 (S.D. Ohio 1979).

4. Not only has DOE not indicated to a "high standard of certainty" an intention to preempt New York's law; in DOE's only statements on the subject, it has made clear that it does not regard its regulations, or their revocation, as having that effect. *See United States* v. *Larionoff,* 431 U.S. 864, 872 (1977) ("ultimate criterion" in construing regulations is administrative interpretation, which is "controlling" unless "plainly" incorrect). DOE expressed its position directly in a letter by Eric J. Fygi, Acting General Counsel of DOE, to Governor Carey of New York on June 10, 1980. Mr. Fygi, writing on behalf of the Secretary, stated that the then-pending legislation "would not, if enacted, conflict either with the Emergency Petroleum Allocation Act or with its implementing regulations." Apdx. 103a.

TECA gave no weight to this letter, because it was in response to an informal request to the Secretary and because it was, as Mr. Fygi conceded, composed with some haste. But this misses the fact that the primary importance of the DOE letter is not as a ruling of law but as a compelling demonstration that DOE did not believe the New York statute would obstruct the program crafted by its regulations and deregulatory amendments. The legal niceties of DOE's analysis are beside the point. What is significant is that DOE, given a clear opportunity to make manifest a preemptive intent, instead responded with alacrity to accommodate the State.

Moreover, the supposed defects of Mr. Fygi's letter do not bear on DOE's other opinion letter—which, astonishingly, was

never even mentioned by either the District Court or TECA. After Connecticut passed a statute controlling the prices of certain petroleum products that had been removed from federal regulation, appellee Mobil wrote to DOE on May 16, 1980, asking DOE to indicate that the statute conflicted with federal law. Apdx. 107a. Six weeks later, on July 1, DOE replied bluntly—and without qualification—through General Counsel Lynn Coleman: "We do not agree with your contention that § 13(b) of the Connecticut Law is preempted . . . ." Apdx. 108a. That the decision was adverse to the interests of the oil companies gives them no cause to complain about the informality of the procedure leading to it; an oil company requested the opinion and was the only party to present its views to DOE.*

If, as DOE has said, the Connecticut law is valid, the validity of New York's law, so far as it relates to deregulated products, follows *a fortiori*, for Connecticut's statute, unlike New York's, is a blatant price regulation. Only by completely disregarding the views of DOE, which formulated the regulations and the deregulating amendments, could one possibly reach the conclusion that New York's statute is preempted.

The principal evidence of preemption relied upon below was statutory rhetoric about the free market system. That rhetoric, however, is ambiguous at best. *See* p. 8n *supra*. While it would support a Congressional enactment barring the states from interfering with the free market, Congress never enacted such a prohibition.

In short, the asserted preemption in this case is the work of neither the Congress nor of the administrative agency. It is a judicial creation, pure and simple, and it has eroded the principles of federalism under which the states may not be ousted from their traditional areas of authority absent a manifest Congressional or administrative intent to do so.

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* Mobil did not bring the Coleman letter to the attention of the District Court for the District of Connecticut, which held the Connecticut law invalid in *Mobil Oil Corp.* v. *Dubno*, 492 F. Supp. 1004 (D. Conn. 1980).

C. New York's Passthrough Prohibition Is Not Preempted By Dormant Federal Authority.

The most significant impact of the TECA decision is its holding that New York's passthrough prohibition is preempted even while federal price regulatory authority lies dormant. TECA based this holding on a perception that the revocation of federal regulations pursuant to EPCA represented a legislative decision that, so long as standby authority existed, petroleum products be free of all laws that may have any effect on price.

This is a startling proposition, one never articulated when the statute was enacted, and one which, if articulated, would have been the subject of the fiercest public debate and controversy. We believe that on plenary consideration we will be able to show that for several reasons this proposition makes little sense:

— The extraordinary, temporary federal regulation of petroleum products was superimposed on a well-established system of state oil production controls, which have remained in effect throughout and remain in place today. In specifically authorizing the revocation of the federal controls in 1975, Congress gave no indication that it intended to eradicate these state controls. As when it authorized the revocation of the World War II price controls, Congress spoke rhetorically of restoring a free market. *See* Pub. L. No. 79-548, 60 Stat. 664 (1946) (seeking "a successful transition to a peacetime economy . . . under a system of free enterprise"). And, as before, this rhetoric meant an end only to temporary federal intervention, not to traditional state powers.

— It makes no sense to believe that, two years after singling out the petroleum industry for extraordinary federal intervention, Congress decided that the industry was working so smoothly that it must again be singled out for an "Adam Smith" exemption against all state legislation bearing on prices. Under TECA's theory, it a state enacted a passthrough prohibition as part of a general sales or gross receipts tax on all industries, oil companies alone would be exempt.

— Congress provided for a "gradual return" to a market free of federal regulation. But under TECA's theory, on September 30, 1981 dormant federal authority will be replaced by active regenerated state power; the petroleum industry would thus be subjected to more regulation than before, not less. The alternative theory, that state power is ousted indefinitely, is even less logical. Under that theory, in the year 2081 the states will be able, barring further Congressional action, to regulate the price of milk or of chambermaids' wages but not of oil, because for several years a century before federal petroleum regulations were in effect.

— Even if—all these considerations notwithstanding—the Federal Government intended to preempt state price regulations, it did not attempt to interfere with the ordinary state power to determine the incidence of a state tax. The federal government has not "addressed and acted upon," *see Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 174 (1978), and has no interest in, the question of who shall bear the burden of a state's taxes. That is the only question "addressed and acted upon" by New York's passthrough prohibition. There is no conflict.

D. The Former Federal Regulations Did Not Preempt New York's Passthrough Prohibition.

Two fundamental misunderstandings infect TECA's holding that the federal price controls, while they were still in effect, preempted New York's anti-passthrough provision.

First, TECA held that "[t]he state tax" interferes with the balance established by the regulations because "sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states." Apdx. 8a. But it was never the purpose of the regulations to ensure that the net income of the oil companies would be evenly distributed across state lines. To the contrary, although refiners were allowed to include certain taxes in the computations leading to determination of the "maximum allowable price," they were specifically

barred from so including income taxes. 10 C.F.R. § 212. 83(c)(2)(iii)(E)(*7*).

TECA's theory would prohibit any tax or regulation—even a safety regulation—that makes one state a more expensive one than others in which to do business. The very vigor with which the oil companies have opposed proposed taxes even *without* passthrough prohibitions, *see, e.g.*, Mobil advertisement in *New York Times*, July 8, 1981, p. A11, demonstrates that such a tax diminishes net income in the taxing state as compared to its neighbors. But plainly the federal regulations did not preempt such taxes.

Second, TECA believed that the oil companies might be able to pass on the cost of New York's tax to purchasers in other states. Apdx. 8a. This factual conclusion has no factual basis on this motion for summary judgment, was vigorously disputed below, and makes no economic sense. The oil companies are presumably already charging their optimal prices in other states. That their prices may be limited in New York will not enable them to charge higher prices in other states, especially since they face competition in those states from companies not subject to the New York tax.

At least two of the oil companies have in effect asserted their agreement with us on this point. Norman Goldberg, Senior Vice President, Marketing, of Amerada Hess, has stated in an affidavit in this litigation that market conditions would cause the company "to lose customers and sales" if it were to attempt to pass through New York's tax outside the state "in any substantial degree." Apdx. 110a. Similarly, in its Albany Action NEPCO has contended that when it must compete "with suppliers who have not been subject to the New York gross receipts tax" it will not be able to pass through the cost of the tax. *Memorandum in Support of Summary Judgment Motion*, pp. 9-10.

If plenary consideration is granted, we will also make the following points:

— The now-revoked federal price regulations merely established a mechanism for determining the "maximum allowable price" that federal law prohibited the refiners from exceeding. In making that computation, refiners could include the cost of certain taxes, arguably including the tax at issue here. But nothing in EPAA, or in the regulations themselves, gave the refiners a *right* to charge the maximum price if that would violate state law. This is the classic case of confusing compliance with a duty with possession of a right. *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

— Even if the federal regulations did preempt all state price controls, they would not invalidate New York's passthrough prohibition, which is simply a rule determining the incidence of a state tax. The federal price regulations were drafted with the intention of accommodating, not overriding, state decisions with respect to the incidence of state taxes. It was for this reason that the regulations specifically barred passthrough of income taxes, which states intend to be absorbed by the taxpayer. So far as its impact on federal policy is concerned, New York's tax is no different from an ordinary income tax. DOE and its predecessor consistently applied the regulations as they evolved in accord with the federal policy—reflected also in § 1341 and other contexts—of deferring to the states on matters of state tax law. *E.g., State of Hawaii*, 2 DOE ¶ 80,174 at 80,939 (1978) ("especially influenced" by states' intent as to tax incidence).

In sum, the New York passthrough prohibition does not conflict with any policy represented by the now-revoked federal regulations or the soon-to-expire federal statute. The federal judiciary should not preempt the law of a sovereign state except on the basis of an intention or policy articulated by Congress or the administrative agency to which Congress delegated the power to craft the regulatory program. There is no such intention or policy in this case.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction, or in the alternative grant a writ of *certiorari*, to review the opinion and judgment of the court below.

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MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION, PLAINTIFFS-APPELLEES,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office, DEFENDANTS-APPELLANTS.

AMERADA HESS CORPORATION, PLAINTIFF-APPELLEE,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office, DEFENDANTS-APPELLANTS.

NEW ENGLAND PETROLEUM CORPORATION,
PLAINTIFF-APPELLEE,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Northern District of New York

(Nos. 80 Civ. 543, 80 Civ. 570, 80 Civ. 544)

Before:

METZNER, PECK and LACEY, Judges.

METZNER, Judge.

This is an appeal from a judgment entered on an order granting plaintiffs' motion for summary judgment.

In June of 1980, New York State established a 2 per cent tax on the gross receipts of oil companies limited to their revenues derived from activities within the state. 1980 N.Y. Laws ch. 271, 272; N.Y. Tax Law § 182 (McKinney Supp. 1980). The statute further provided that the oil companies could not pass the cost of the tax on to consumers by increasing the sales price of their products in this state. Ten oil companies subject to the tax instituted suit to enjoin the anti-passthrough provision based on the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

Plaintiffs claim that the state statute is in conflict with the Emergency Petroleum Allocation Act (EPAA) (Pub. L. 93-159, 15 U.S.C. § 751, et seq.) and the regulations adopted thereunder. The district court agreed with that position and appeals followed to this court and the Court of Appeals for the Second Circuit.

The prosecution of the appeal in this court was stayed pending determination by the Court of Appeals.

On January 28, 1981 the Court of Appeals held that the district court in disposing of the question of preemption, had disposed of an EPAA issue over which this court had exclusive appellate jurisdiction. *Mobil Oil Corp. v. Tully*, 639 F.2d 912 (2d Cir. 1981).[1]

The question before this court is limited to whether the anti-passthrough provision of the New York Tax Law is invalid under the Supremacy Clause. The plaintiffs do not challenge the imposition of the tax. However, an affirmance of the district court's finding of unconstitutionality will void the tax. Section 12, L. 1980 c. 271, as added by L. 1980, c. 272, § 5.

In *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947), the Court set forth the criteria to be applied in determining whether the exercise by a state of its police power in the adoption of a statute may be challenged successfully under the Supremacy Clause.

> "Congress legislated here in a field which the States have traditionally occupied. See *Munn v. Illinois*, 94 U.S. 113; *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-149. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose

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1 The Court of Appeals held that it had jurisdiction to decide that the district court was not deprived of jurisdiction by the Tax Injunction Act (28 U.S.C. § 1341) because the statute under attack is an exercise of the police power rather than the taxing power of the State.

> may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co., supra*."

Preemption in this area is compelled "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Even if Congress has not foreclosed the field, a state statute is void to the extent of actual conflict with a federal statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 165 (1978); *Hill v. Florida*, 325 U.S. 538 (1945). This standard was recently outlined by the Supreme Court in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232, 4233 (March 9, 1981):

> ". . . when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' *Perez v. Campbell*, 402 U.S. 637, 649 (1971) quoting *Hines v. Davidowitz* . . . supra, at 67-68."

Judge McCurn found it unnecessary to decide whether Congress had intended that there be exclusive federal control

over allocation and pricing of petroleum products, resting his decision on the "conflict" standard for preemption. We, too, do not reach the "occupation of the field" question; we find sufficient basis under the conflict standard to exclude the State from exercising its police power in enacting the anti-passthrough provision.

The procedure in analyzing possible preemption under the conflict standard is to compare the two statutes; and second, to determine whether there is a conflict between them. This second inquiry focuses on the nature of the activity which the state has attempted to regulate, rather than the method of regulation used. *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., supra*, 49 U.S.L.W. at 4233.

With the advent of the Arab oil embargo in 1973, this country was faced with a national crisis in the flow of energy supplies and inflation. Congress addressed the problem in the passage of the EPAA. The statute stated that shortages of crude oil, residual fuel oil and refined petroleum products existed which would create severe economic hardships that would jeopardize the normal flow of commerce and "constitute a national energy crisis which is a threat to the public health, safety, and welfare, and can be averted or minimized effectively through prompt action by the Executive branch of Government." Section 751(a)(3). The statute went on to say that "the authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy." Section 751(b). Section 753(b)(1)(F) states, as one of the objectives of the statute, the "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices . . . ."

Senator Jackson, as floor manager of the bill, said, "Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level." 119 Cong. Rec. 17764 (1973). Finally, the conferees who submitted the bill for final passage by the Congress said:

> "On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods

> which will permit adequate compensation to assure that private property is not implicitly confiscated by the government." [1973] U.S. Code Cong. & Admin. News, pp. 2702-3

In adopting the 1975 amendments to EPAA, known as the Energy Policy and Conservation Act (EPCA), Congress reiterated its goal that "the Arab boycott raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level." [1975] U.S. Code Cong. & Admin. News, p. 1763.

The EPAA and the regulations form a framework for federal control of price and allocation of petroleum prices. However, the tenor of federal regulation of petroleum products has substantially changed since this action was brought and the decision of the district court was handed down.

In 1975 Congress gave the President authority to exempt, in his discretion, "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from price and allocation regulations under the EPAA, consistent with the nine statutory objectives noted above. 15 U.S.C. § 760a, Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975). The President has standby authority to reimpose regulation of any oil or refined product category which is exempted. 15 U.S.C. § 760a(f).

At the time this matter was submitted to the court below for determination, only gasoline, propane, and certain natural gas liquids remained subject to the price regulations. All other petroleum products had been exempted. On January 28, 1981, while this case was awaiting appellate disposition, President Reagan exercised his authority to exempt the remaining products. 46 Fed. Reg. 9909. Consequently, at the present time there are no price and allocation controls in existence.

However, despite the exemption of all petroleum products from price and allocation regulations by executive order, the federal slate has not been wiped clean. The standby authority of the President to reimpose controls (15 U.S.C. § 760a(f))

remains in effect, at least until that authority expires on September 30, 1981. 15 U.S.C. § 760g.

The regulations which were promulgated under the EPAA are a complex set of rules to allocate petroleum products; control prices charged; and dictate the method of computation of any increases in price. Subpart E, 10 C.F.R. §§ 212.81-85. Prices are controlled by limiting refiners to a "maximum allowable price," computed as the weighted average price at which the covered product was sold on May 15, 1973, plus defined increased product and nonproduct costs since that date. 10 C.F.R. §§ 212.82(6) and 212.83.

In 1977 "federal, state and local tax increases," excluding income taxes, were included in the nonproduct costs which the refiners were permitted to use to compute their maximum allowable price. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), 42 Fed. Reg. 5025 (January 27, 1977). Property, excise, franchise and similar taxes are explicitly included.

Turning now to the New York State statute, its purpose was to raise money to assist the public transportation system in the state which is in dire financial straits. To achieve this end, the state enacted a franchise tax, New York Tax Law § 182 (McKinney Supp. 1980), and, as pointed out above, this tax was within the group of taxes which an oil company under the federal regulations could have passed through to the consumer. The consuming public was to be protected against an increase in retail cost by the anti-passthrough provision and the fires of inflation would not be fed as a result.

The anti-passthrough provision is clearly a price control measure in exercise of the State's police power. The stated purpose of the provision is to prevent "further increases in the price of petroleum products to consumers," and to prevent the tax from "fueling inflation by prohibiting pass through of such tax to the consumers of this state." N.Y. Act, Ch. 272, § 1. As the Court of Appeals noted in another context, "[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." *Mobil Oil Corp. v. Tully, supra* at 918. We agree with this observation.

The federal controls were imposed to assure equitable distribution of oil products and equitable prices. The latter requires a fair balance between seller and buyer, and between geographical areas. The conferees stated that the sellers were to be assured adequate compensation to prevent the confiscation by the government of private property.

The state tax upsets this balance. The sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states.

Furthermore, the sellers, in order to recoup this loss, will try to pass on the cost of the franchise tax to purchasers in other states. To the extent that they are able to pass on the tax, the goal of equitable pricing is not met.

Appellants claim that the EPAA by its terms precludes a finding of preemption in this case. Section 755(b) provides:

> "The regulation under section 753 of this title and any order issued thereunder shall pre-empt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

The argument is made that since this section specifies preemption only if a state law providing for allocation of a product is in conflict with a regulation issued pursuant to Section 753, there can be no preemption if the conflict exists outside that narrowly defined area. Appellants rely on a letter from the Acting General Counsel of the Department of Energy (DOE) to the Special Counsel to the New York State Tax Commission. The letter states that in the opinion of the writer, "the Emergency Petroleum Allocation Act itself displaces State law only to the extent that that statute or its implementing regulations conflict with state law . . . ." It is interesting to note that the letter defines the area of preemption in slightly broader terms than appellants do—federal statute as well as regulations in conflict with state law.

The Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), set forth the criteria for judging the effective-

ness of this letter. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The writer of the letter took care to limit its effectiveness by stating as a caveat, "First, the time within which I was advised to require a response to this question did not permit an exhaustive analysis of the question you posed." Furthermore, as Judge McCurn said, "the conclusion of the letter was, in light of *Jones*, reached either with reference to, or through the correct application of, judicially determined preemption principles."

Finally, under DOE's own regulations, the letter is of little value. It appears that the request to DOE for an interpretation did not comply with its requirements for such an interpretation. Replies to such requests cannot be considered as interpretations but only as "providing general information." 10 C.F.R. 205.80.

Jones v. Rath Packing Co., 430 U.S. 519, 540-41 (1977) determined that even though an express preemption provision did not invalidate a state law, the question still had to be determined "whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " It borders on the ridiculous to conclude, in the context of the crisis being addressed here, that there may be preemption in the area of allocations, but there is no preemption in the area of pricing.

Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA expires by its terms on September 30, 1981. 15 U.S.C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price

control and in conflict with the objectives of the program. See *Ray v. Atlantic Richfield*, 435 U.S. 151, 178 (1978).

When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations.

Judgment affirmed.

Final Judgment of the Temporary Emergency Court of Appeals—June 15, 1981

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 2-29

MOBIL OIL CORPORATION, et al.,

Plaintiffs-Appellees,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

No. 2-30

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

No. 2-31

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

Before:

METZNER, PECK and LACEY,

Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of New York and was argued by counsel.

In consideration whereof, it is ORDERED that the judgment of said court is AFFIRMED.

FOR THE COURT:

/s/ Ruth H. Jacobson

RUTH H. JACOBSON
Clerk

Judgment Entered: June 15, 1981

No. 2-29—District Court No. 80-CV-543

No. 2-30—District Court No. 80-CV-570

No. 2-31—District Court No. 80-CV-544

Notice of Appeal in the Temporary Emergency Court of Appeals—June 30, 1981

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

TECA Nos. 2-29, 2-30, 2-31.

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of

New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James H. Tully, Jr., Thomas H. Lynch and Francis Koenig, constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York; and James L. LaRocca, Commissioner of the New York State Energy Office, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Temporary Emergency Court of Appeals entered in this action on June 15, 1981 which affirmed a judgment entered on an order of the United States District Court for the Northern District of New York (MCCURN, J.), 497 F. Supp. 888 (1980), granting appellees' motion for summary judgment.

This appeal is taken pursuant to 28 USC § 1254(2).

Dated: Albany, New York
June 30, 1981

ROBERT ABRAMS
Attorney General of the
State of New York

By /s/ Shirley Adelson Siegel
SHIRLEY ADELSON SIEGEL
Solicitor General
Attorney for Appellants
The Capitol
Albany, New York 12224

Opinion of the United States Court of Appeals for the Second Circuit in *Mobil Oil Corp., et al. v. Tully, et al., New England Petroleum Corp. v. Tully, et al.*, and *Amerada Hess Corp. v. Tully, et al.*, No. 80-7785—January 28, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOBIL OIL CORP., ATLANTIC RICHFIELD CO., UNITED REFINING CO., INC., and GULF OIL CO., CHEVRON U.S.A. INC., AMOCO OIL CO., TEXACO INC. and EXXON CORP.,

Plaintiffs-Appellees,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES J. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORP.,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

AMERADA HESS CORP.,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES J. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

Before:

MULLIGAN and VAN GRAAFEILAND, *Circuit Judges* and WERKER, *District Judge.**

MULLIGAN, *Circuit Judge*:

On June 18, 1980, New York Governor Hugh Carey signed into law two bills, Senate Bills 10188 and 10261, which created a new Section 182 of the New York Tax Law and established a

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* United States District Judge for the Southern District of New York, sitting by designation.

2% tax on the "gross receipts" of oil companies doing business in New York. 1980 N.Y. Laws, ch. 271, 272 (N.Y. Act); N.Y. Tax Law § 182 (McKinney Supp. 1980). The express purpose of the tax is to raise additional revenue to aid the State's ailing public transportation system. N.Y. Act, ch. 272 § 1. Indeed, it has been estimated by the New York State Division of the Budget that the new tax would raise an additional 235 million dollars annually. Oil companies were reported to have reaped unjustifiably high profits as a result of market conditions and were therefore deemed to be an appropriate source of revenue. N.Y. Act, ch. 272 § 1. In order to ensure that the oil companies, and not the consuming public, bore the burden of the tax, the legislature provided in Section 4(12)(a) of the Act (the anti-passthrough provision) that:

> [t]he tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12)(a) (McKinney Supp. 1980). Companies which are found to have passed on the cost of the tax through product pricing are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. N.Y. Tax Law § 182(12)(b)(2). In addition, the legislature hinged the viability of the tax itself upon the validity of the anti-passthrough provision. In 1980 N.Y. Laws, ch. 272, § 5 (the self-destruct provision), the legislature provided that:

> [i]f the provisions of [the anti-passthrough section] is [sic]: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212)

promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect [ten days thereafter].

The plaintiffs-appellees, ten oil companies concededly subject to the tax, instituted these actions in the Northern District of New York against the defendants-appellants, New York State Tax Commission, New York State Attorney General and the Commissioner of the New York State Energy Office, seeking declaratory and injunctive relief. The oil companies argued that the anti-passthrough provision was invalid (a) because it conflicted with the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, et seq. (EPAA) and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, issued thereunder and was therefore preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2); and (b) because it violated the Commerce and Due Process Clauses of the United States Constitution. At no time did the plaintiffs attack the validity of the tax itself. The plaintiffs, after expedited discovery, moved for summary judgment while the defendants moved to dismiss the actions for lack of federal jurisdiction under 28 U.S.C. § 1341, the Tax Injunction Act. By order dated September 4, 1980, the District Court denied the defendants' motion to dismiss and granted summary judgment in favor of the plaintiffs.

In a memorandum and decision dated September 19, 1980, Judge Neal G. McCurn held that the anti-passthrough provision was in effect a price control and not a rule of tax incidence. *Mobil Oil Corp. v. Tully*, No. 80-CV-543, slip op. at 10 (N.D.N.Y. September 19, 1980). The court therefore held that the Tax Injunction Act, 28 U.S.C. § 1341 was inapplicable. *Id.* In addition, because the "price control" provision was found to be in conflict with the EPAA and the regulations issued thereunder, Judge McCurn declared that the provision was preempted by federal law with respect to exempt and non-exempt petroleum products. *Id.* at 37, 43. Judgment was

entered on September 19, 1980 but on motion by the defendants-appellants, the District Court stayed enforcement until October 31, 1980. *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y. September 29, 1980). The stay was continued by this court in a ruling from the bench at oral argument on October 30, 1980.

The defendants-appellants appeal from Judge McCurn's order denying their motion to dismiss and granting the plaintiffs-appellees' motion for summary judgment. The appellees have moved before this court to dismiss the appeal for want of appellate jurisdiction. Arguing that this case "arises under" the EPAA, the appellees' position is that exclusive jurisdiction over all issues in this case is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), which incorporates the review provisions of Section 211(b)(2) of the Economic Stabilization Act. 12 U.S.C.A. § 1904, note (West Supp. 1980). Thus, this case and its companion case also decided today, *Mobil Oil Corp. v. Dubno*, No. 80-7677, slip op. ____ (2d Cir. ____) require an analysis of the appropriate allocation of appellate jurisdiction between a court of appeals and the TECA.

I

The Motion to Dismiss

(a) Preemption

The threshold issue on this appeal is whether this court has jurisdiction to hear it. The appellee oil companies have argued that Section 211(b)(2) of the ESA, 12 U.S.C.A. § 1904, note (West Supp. 1980), provides that the Temporary Emergency Court of Appeals (TECA) has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [ESA]." Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), incorporates by reference the jurisdictional provisions of § 211 of the ESA where there is judicial review of the regulations promulgated under Section

753(a) of the EPAA (mandatory allocation of crude oil, residual fuel oil and refined petroleum products) as well as any order or action taken by the President or his delegate under the chapter.

In *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979) we held that a case or controversy arises under the ESA or EPAA where the district court has adjudicated an "ESA issue." (The court used that expression to mean issues involving the ESA and the EPAA as well as regulations promulgated under both statutes. *Id.* at 182 n.3). The Tenth Circuit has indicated that an ESA issue is one "involving the construction, applicability and effect" of the EPAA, *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

The preemption issue presented here does not present an EPAA question which was adjudicated in the District Court and is thus within TECA's exclusive appellate jurisdiction. A major contention of the oil companies was that Section 182(12)(a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provisions thus void under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2). To make the determination that the state law conflicted with the federal regulations, as Judge McCurn found, necessitates "a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder." *Mobil Oil Corp. v. Tully*, supra, slip op. at 6. The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. *Id.* at 17-43. Whether that analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations.

The appellants argue that the preemption claims arise under the Constitution rather than the EPAA and thus do not pose an EPAA question. The argument is not persuasive. In *Swift &*

Co. v. Wickham, 382 U.S. 111 (1965), the Supreme Court held that the issue of preemption did not involve a substantial constitutional question so as to warrant the convening of a three judge court pursuant to 28 U.S.C. § 2282. The Court declared that the basic question involved in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Id.* at 120. See also *American Federation of Labor v. Watson*, 327 U.S. 582 (1946).

This Court has made a similar analysis in *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975):

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

It is obvious that in this case the trial court was obligated to and did make an analysis and interpretation of the two statutory schemes involved here, both state and federal. Having found that an impermissible conflict existed between the anti-passthrough provision and the federal statute, regulations and congressional policy, the finding of preemption was automatic. Appellants further argue that if arguendo the District Court did have exclusive jurisdiction in all suits arising under the EPAA, then it should not have adjudicated that issue but rather it should have followed the statutory mandate of Section 211(c) and made a determination as to whether a substantial constitutional question exists and if so "certify such issue to [TECA]." While our analysis would indicate that the substantial issue was statutory and regulatory analysis and interpretation rather than constitutional, the short answer to the contention is that the certification issue is a determination to be made by TECA and not this court. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), cert. denied, 444 U.S. 879 (1979).

Appellants' further argument that an EPAA question is one limited to cases and controversies involving a regulation promulgated under Section 753(a) and not to all cases or controversies arising under the EPAA itself is at odds with our

statutory interpretation in *Coastal States Marketing v. New England Petroleum Corp., supra.* Here the District Court did analyze and apply the statute, the regulations and the underlying congressional policy. The District Court further made an adjudication resting on its interpretation of that federal scheme. It therefore decided an EPAA issue sufficient to vest TECA by statutory mandate with exclusive jurisdiction of this appeal on the preemption issue.

(b) The Anti-Injunction Act

The oil company appellees' motion to dismiss the appeals on jurisdictional grounds is also addressed to the second issue on this appeal—that 28 U.S.C. § 1341, the Tax Injunction Act, deprived the District Court of jurisdiction. The appellants argue that the determination of the District Court that 28 U.S.C. § 1341 did not deprive it of jurisdiction was erroneous. The appellees contend, however, that the issue was ancillary to the EPAA question and therefore within TECA's exclusive appellate jurisdiction. We disagree with both arguments.

Section 1341 precludes the district courts from enjoining, suspending or restraining "the assessment, levy or collection or any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is apparent that the inquiry of the District Court on this issue did not require any analysis of the EPAA or its regulations. It required solely an interpretation of a state statute to determine whether or not an injunction, suspension or restraint was proscribed by the federal statute. Appellees seemingly recognize this but denominate it as an issue ancillary to the EPAA preemption question and therefore within TECA's exclusive jurisdiction.

In a comparable setting TECA has declined to take jurisdiction. In *Texaco, Inc. v. Department of Energy,* 616 F.2d 1193 (TECA 1979) TECA declined to accept jurisdiction to review a District Court holding that the Federal Energy Regulatory Commission had review authority under the Department of Energy Organization Act even though the DOE actions were to be reviewed by the FERC were taken under the EPAA. The

court reasoned that since the District Court's only decision was that the FERC had review authority, which was under the DOE Act and not the EPAA, it could not exercise jurisdiction since it involved the interpretation of a statute not within the review provisions of 15 U.S.C. § 754(a). The court stated, ". . . TECA has repeatedly refused to exercise jurisdiction over issues or claims not arising under the EPAA even though they may be joined in the same case with other issues or claims that do arise under the EPAA." *Id.* at 1196.

Here the federal statutory prohibition is plainly not within the EPAA and the refusal of TECA to exercise such jurisdiction is reasonably to be anticipated. Obviously, the TECA position can result in bifurcated appeals as it will in this case but that has been anticipated by this court in *Coastal States Marketing v. New England Petroleum Corp., supra*, 604 F.2d at 185. It is desirable to defer to a specialized federal appellate court, TECA, with its special expertise on EPAA issues, which in this appeal, includes the preemption question involving analysis of the congressional intent in enacting the EPAA and the interpretation of the regulations adopted pursuant thereto.

The oil companies rely upon several TECA holdings where TECA did take jurisdiction over ancillary non-EPAA issues so that it could "perform . . . the normal and necessary functions of any court." *Quincy Oil Inc. v. Federal Energy Administration*, 620 F.2d 890, 893 (TECA 1980). However, TECA has exclusive jurisdiction only over EPAA issues. *Coastal States, supra*, 604 F.2d at 181. This Court as a court of appeals has concurrent jurisdiction in an appeal from a final order of a District Court over independent issues which do not present an EPAA question. *Id.* at 186. The Section 1341 question is substantial and is independently appealable to this court. The oil company's [sic] reliance on *M. Spiegel & Sons Oil Corp. v. B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976) is misplaced. That case did involve an appeal from an EPAA question which was within the exclusive jurisdiction of TECA as well as an ancillary issue—an appeal from an interlocutory order of the District Court refusing to transfer the action to another District Court. Our dismissal was based on the proposition that a

ruling on a transfer motion is not independently appealable under 28 U.S.C. § 1291(a)(1). In this case the Section 1341 issue is independent and severable from the EPAA question and presents us with an appealable order from a final order of the District Court.

We conclude therefore that the motion to dismiss the appeal on jurisdictional grounds is granted with respect to the preemption question and denied as to the Section 1341 issue.

II

Having determined that the preemption issue is within the exclusive jurisdiction of TECA and that the applicability of the Tax Injunction Act is properly before this court, we address the latter issue. Section 1341 is brief and facially clear:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The position of the State defendants is essentially that the order of the District Court has effectively restricted the "assessment, levy or collection" of a New York State Tax and is thus within the clear proscription of Section 1341. The oil companies argue that they do not at all challenge the validity of the tax but simply the anti-passthrough provisions which they denominate as an exercise not of the taxing power of the State but rather its police power. The anti-passthrough provision, they urge, is a price fixing statute and not a taxing device. While the statutory linkage between the validity of this provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, this was the calculated decision of the legislature and not the result of the court's determination. While the briefing and argument on this issue has been intensive, there is not authority precisely in point.

The State appellants argue that Section 182(12)(a) is a state tax law and that the State has the authority to select the target

of the tax. They rely upon language in *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 347-48 (1968) where the Court held invalid a Massachusetts statute which imposed a sales tax upon a national bank. In the course of its opinion the Court construed the state statute as imposing the legal incidence of the tax upon the purchaser rather than the vendor. The Massachusetts State Court from which the appeal originated had construed the statute to impose the tax on the vendor. In reversing, the court stated "[t]here can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." *Id.* at 348. It is difficult to understand how the State can reasonably construe this language to be helpful here. There was no Section 1341 issue in that case at all—the appeal was not from a district court but a state court. No one questions the right of the State of New York to place the legal incidence of the tax upon the oil companies—but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product.

As we have indicated the tax purpose of the legislation was to raise funds for the mass transit system. However, the purpose of the anti-passthrough provision was not to raise taxes but "to do nothing that will contribute to further increases in the price of petroleum products to (New York) consumers" and "to prevent such gross receipts tax from fueling inflation by prohibiting the passthrough of such tax to the consumers of this state." N.Y. Act, ch. 272, § 1.

This objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products. We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, the State has gone beyond its taxing powers and has employed its police powers. Whether this is appropriate is not the issue before us; whether it results in a collision with EPAA is for

TECA. We simply hold that that action is not insulated from federal scrutiny by Section 1341.

The mere fact that the anti-passthrough section is contained in a tax law of the State should not lead to automatic sanctuary under Section 1341. In *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), this court held that a District Court was not prevented from considering the constitutionality of a Vermont Motor Vehicle Tax which provided for the suspension of a motor vehicle license if the owner failed to pay the tax due under the state law. An indigent claimed that such suspension created irreparable and immediate hardship and harm to him in violation of his equal protection rights under the fourteenth amendment. This court found that his attack did not seek a restraint upon the assessment, levy or even the collection of the tax.

That the attack of the oil companies is not on those sections of Section 182 which provide for the assessment, levy or collection of the tax within the prohibition of Section 1341, is bolstered by the statement of James H. Tully, Jr., Commissioner of Taxation and Finance of the State of New York in his affidavit in support of a stay which states in part that the plaintiffs "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." He further stated that anti-passthrough provision "is all that the court enjoined."

We agree therefore with the District Court that the anti-passthrough provision is not an exercise of the taxing power of the State within Section 1341 but rather of its police powers directed to its express concerns about inflation and rising fuel costs. A constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341.

Having so held we need not address the issue of whether or not a plain, speedy and efficient remedy may be had in the courts of this State.

The stay of enforcement is continued by this court and shall continue only until such time as the State can seek a stay from TECA. Any motion for further relief should be directed to that court.

Opinion of the United States District Court for the Northern District of New York in *Mobil Oil Corp., et al.* v. *Tully, et al.*, *New England Petroleum Corp.* v. *Tully, et al.*, and *Amerada Hess Corp.* v. *Tully, et al.*, Nos. 80 Civ. 543, 80 Civ. 544, 80 Civ. 570—September 19, 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, UNITED REFINING COMPANY, INC. and GULF OIL COMPANY,

Plaintiffs,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants.

AMERADA HESS CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEAL P. MCCURN, *D. J.*

MEMORANDUM AND DECISION

Plaintiffs in these actions seek (a) a declaration that section 182(12) of the New York Tax Law, as added by L. 1980, ch. 271 § 4 and ch. 272 § 2, which prohibits the passthrough of the State's recently enacted two (2%) percent gross receipts tax on certain oil companies is unconstitutional and thus invalid and (b) a permanent injunction enjoining the defendants from enforcing the anti-pass through provision. Relief is sought on the grounds that the anti-pass through provision (1) establishes a state price control rule which conflicts with the Federal Emergency Petroleum Allocation Act of 1973, §§ 1-19, 15 U.S.C. § 751-760h as amended, (EPAA), and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212 (Price Regulations) promulgated thereunder, and is thus void under the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, cl. 2); (2) impermissibly burdens interstate commerce and thus is void under the Commerce Clause of the United States Constitution (U.S. Const. Art. I, § 8, cl. 3); and (3) contravenes the Due Process Clause of the Four-

teenth Amendment to the United States Constitution. (U.S. Const. Amend. XIV, § 1).

Plaintiffs in all three actions assert jurisdiction under 28 U.S.C. §§ 1331 and 1337. In addition, plaintiffs in the Mobil Oil and Amerada Hess actions claim that exclusive original jurisdiction is vested in this Court by § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), as expressly incorporated by reference in § 5(a) of the EPAA (15 U.S.C. § 754(a)], and section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b).[1]

The three actions are presently before the Court on the defendants' motion to dismiss pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 and the plaintiffs' motions for summary judgment under Rule 56 of the Fed. R. Civ. P. on their respective pre-emption claims.[2]

THE NEW YORK LEGISLATION

On June 18, 1980, the Governor of New York State signed into law two bills which impose an annual tax "upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the State as

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1 Plaintiffs in the Mobil Oil action also include section 210(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note in their exclusive jurisdiction claim.

2 A pretrial conference with regard to all three actions was held by the Court on July 29, 1980, for the purpose of establishing an accelerated litigation schedule. At that conference it was decided that defendants' motion to dismiss would be argued on August 20, 1980. It was further determined that motions for summary judgment to be brought by the plaintiffs would be heard on August 27, 1980, and would be limited to the parties' pre-emption claims, without prejudice to plaintiffs' seeking summary judgment on their Commerce and Due Process claims at a later date.

Plaintiff, New England Petroleum Corporation's motion for a preliminary injunction with a consolidated hearing on the merits pursuant to Rule 65 of the Fed. R. Civ. P. was scheduled to commence September 10, 1980.

hereinafter provided. . . ." (L. 1980, ch. 271, § 4).[3] The tax is imposed on each company "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity or of maintaining an office in this state, for all or any part of its taxable years." *Id.* Pursuant to the statute the term gross receipts covers all receipts with the exception of "[r]eceipts received by reason of any sale of fuel oil (excluding diesel motor fuel) used for residential purposes" and "receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section." *Id.*

Revenue collected through the imposition of this new tax is earmarked to go into the "regional transportation operating and capital assistance fund", created by the legislation (L. 1980, ch. 271 §§ 2, 11), and is to be used to provide operating and capital assistance to New York State's mass transportation system.

An additional provision of the State's new revenue raising plan prohibits the pass-through of the tax in the prices charged to consumers for products sold by the oil companies in New York State. The anti-pass through provision, which is set forth in subsection 12(a) of the new section 182 of the New York Tax Law, provides that:

> The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

L. 1980, ch. 271, § 4 (12)(a).

Under the new law, each oil company subject to the tax is required to file an annual report with the Commission of Taxation and Finance "certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state the tax imposed by this section." L. 1980, ch.

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3 The full text of Senate Bills 10188 and 10261 is set forth in an Appendix to this Memorandum-Decision.

271, § 4. Companies which are found to have passed on the cost of the new tax through increased product costs or who are found to have filed false reports in violation of the certification requirement are subject to a penalty equal to one hundred (100%) percent of the tax imposed for the year in which the violation occurs. L. 1980, ch. 271, § 4(12)(b)(2).

The plaintiffs in these actions are oil companies within the meaning of the legislation involved in this litigation and are, therefore, subject to the gross receipts tax. Each, in the normal course of business, would generally pass on the cost of the new tax through increased petroleum product prices to customers in the taxing jurisdiction.

None of the plaintiffs challenges the imposition of the gross receipts tax itself. Rather, they challenge only the anti-pass through provision of § 182(12)(a), which is now in effect. As previously indicated, the plaintiffs' motions for summary judgment which are before the Court are limited to the pre-emption claims.

Analysis of the pre-emption claims shall necessitate a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder. However, since the need for a determination on the preemption issue would disappear should the Court grant the defendants' motion to dismiss, that motion should be addressed and disposed of first.

MOTION TO DISMISS

Defendants contend that the Tax Injunction Act, 28 U.S.C. § 1341, divests the Court of jurisdiction in these actions. Plaintiffs disagree. Section 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The defendants' argument for application of the Tax Injunction Act in these cases is basically as follows. Plaintiffs are

challenging the validity of the anti-pass through provision of the new oil company franchise tax legislation. If plaintiffs are successful in having the anti-pass through invalidated, the gross receipts tax, by the terms of the New York legislation "shall cease to be in force and effect." L. 1980, ch. 271, § 12, as amended by L. 1980, ch. 272, § 5. Thus, according to the defendants, the plaintiffs' attack on the anti-pass through provision is in reality an attack on the tax itself. Since a decision by this Court striking down the anti-pass through provision would by virtue of the statutory mandate, effectively "enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law," defendants conclude that the Court is without jurisdiction pursuant to 28 U.S.C. § 1341.

Plaintiffs challenge the defendants' conclusion as to the applicability of 28 U.S.C. § 1341 in these actions and disagree as well with defendants' assertion of the availability to plaintiffs of a "plain, speedy and efficient remedy" in the Courts of New York State. In disputing the existence of a State Court remedy acceptable under 28 U.S.C. § 1341, plaintiffs argue that exclusive jurisdiction over their pre-emption claim rests in federal district court by virtue of § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), which as previously pointed out was expressly incorporated by reference in § 5(a) of the EPAA, 15 U.S.C. § 754(a). Thus, according to plaintiffs there is no state court remedy available.

Since, for reasons to be discussed below, the Court does not find the Tax Injunction Act, 28 U.S.C. § 1341, applicable to these actions, it will not be necessary to reach plaintiffs' exclusive jurisdiction claim.

The Tax Injunction Act embodies long-standing principles of equity and federalism which recognize "the imperative need of a State to administer its own fiscal operations."[4] *Tully* v.

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4 The legislative history of the Tax Injunction Act suggests two purposes behind its passage. The first was to eliminate the discrimination between citizens of a state who were confined to state court in challenging illegal tax assessments and foreign corporations who were able to take advantage of diversity jurisdiction in federal court.

Second, Congress wished to prevent foreign corporations from paralyzing state fiscal operations by refusing to pay state taxes and

Griffin, 429 U.S. 68, 73, 97 S. Ct. 219, 222, 50 L. Ed. 2d 227 (1976). Quoting from the decision of the Supreme Court in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298, 63 S. Ct. 1070, 1073, 87 L. Ed. 1407 (1943), the Court in *Tully* stressed that:

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final restraining collection of state taxes.

Tully v. *Griffin, supra*, 429 U.S. at 73, 97 S. Ct. at 222. *See also Matthews* v. *Rogers*, 284 U.S. 521, 525-526, 52 S. Ct. 217, 219, 76 L. Ed. 477 (1932).

Section 1341 has been found to apply equally to actions for declaratory or injunctive relief. *Houston* v. *Standard-Triumph Motor Co.*, 347 F.2d 194, 198 (5th Cir. 1965); *Helmsley* v. *City of Detroit*, 320 F.2d 476, 478 (6th Cir. 1963); *First United Methodist Church* v. *City of Syracuse*, 489 F. Supp. 185 (N.D.N.Y. 1980).

The Tax Injunction Act has served as the basis for dismissal on jurisdictional grounds of actions directly challenging the validity of a state tax, *see e.g. American Commuters Ass'n* v. *Levitt*. 279 F. Supp. 40 (S.D.N.Y. 1967) *affd.* 405 F.2d 1148 (2d Cir. 1969); *57th St. Management Corp.* v. *City of New York*, 456 F. Supp. 286 (S.D.N.Y. 1978); actions attacking particular aspects of state taxing schemes, which bore a direct relationship to the successful assessment and collection of the tax, *see*

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then commencing long and expensive litigation in federal court. S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). *See also Garrett* v. *Bamford*, 528 F.2d 63, 72 (3d Cir.) *cert. denied* 429 U.S. 977, 97 S. Ct. 485, 50 L. Ed. 2d 585 (1976); *Tramel* v. *Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975).

The Supreme Court, however, has consistently described the Act's passage as a confirmation of the traditional equity practice of federal courts' refraining from exercising jurisdiction over actions challenging state taxes as long as an adequate state remedy was available. *See Tully* v. *Griffin, supra*, 429 U.S. at 73; *Great Lakes Dredge & Dock Co.* v. *Huffman, supra*, 319 U.S. at 298.

e.g. Mandel v. *Hutchinson*, 336 F. Supp. 772 (C.D. Cal. 1971) *aff'd*, 494 F.2d 364 (9th Cir. 1974); and lawsuits challenging the procedures and methods employed in the levy or collection of a state tax. *See e.g. Czajkowski* v. *State of Ill.*, 460 F. Supp. 1265, 1271-74 (N.D. Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978); *Kimmey* v. *H.A. Berkheimer, Inc.*, 376 F.Supp. 49, 54-55 (E.D. Pa. 1974), *aff'd mem.*, 511 F.2d 1394 (3d Cir. 1975).

Section 1341 has, on occasion, been found inapplicable in cases involving an aspect of a state taxing scheme. In *Hargrave* v. *McKinney*, 413 F.2d 320 (5th Cir. 1969), the Court found that § 1341 did not require dismissal of an action in which the plaintiffs sought the collection and disbursement of certain county tax monies rather than an injunction on collection of taxes.

The Second Circuit in *Wells* v. *Malloy*, 510 F.2d 74 (2d Cir. 1975), refused to apply the Tax Injunction Act where the plaintiff challenged a Vermont statute which suspended the state motor vehicle purchase and use tax. Writing for the Court, Judge Friendly stated that in enacting the Tax Injunction Act

> Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law *going to the validity of the particular taxes imposed upon them* (footnote references omitted)—not to a case where a taxpayer contended that an unusual sanction for nonpayment of a tax admittedly due violated his constitutional rights. . . . (Emphasis supplied)

Id. at 77.[5]

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5 The new Tax Injunction Act has also been found to be inapplicable in actions which are either brought by the United States or which although brought by a private individual or group could have been commenced by the United States. *See e.g. Moe* v. *Consolidated Salish and Kootenai Tribes*, 425 U.S. 463, 473, 96 S. Ct. 1634, 1641, 48 L. Ed. 2d 96 (1976); *Department of Employment* v. *United States*, 385 U.S. 355, 358, 87 S. Ct. 464, 466-67, 17 L. Ed. 2d 414 (1966).

There is no question but that the gross receipts tax on oil companies would cease to be in effect at a statutorily ordained time after a determination by the Courts that the anti-pass through provision now under attack is invalid. Nonetheless, this Court as previously stated, does not believe that these cases fall within the jurisdictional proscription of the Tax Injunction Act.[6]

The plaintiffs are not challenging the validity of the gross receipts tax nor are they attacking the statutorily prescribed administrative procedure for assessing, levying or collecting the tax. In fact, but for the "self-destruct" mechanism included in the legislation, a determination by this Court invalidating the anti-pass through provision would have absolutely no affect on the "assessment, levy or collection" of the gross receipts tax. 28 U.S.C. § 1341.

Defendants describe the tax and the anti-pass through provision as a "single entity", with the latter provision being merely a "rule of tax incidence".[7] Plaintiffs, on the other hand, argue that the anti-pass through provision is a state price control measure separate from the tax itself. The Court, having carefully reviewed the statutory language of S-10188 and 10261 agrees that the anti-pass through provision is a price control measure, rather than a rule of tax incidence. *See Schirtzinger* v. *Dunlop*, 489 F.2d 1307, 1310 (Temp. Emer. Ct. of App. 1973) (treating passthrough regulations as a form of price control), and is of the opinion that the "self-destruct" mechanism contained in the legislation indicates an intent on the part of

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6 The Fifth Circuit Court of Appeals in *Hargrave* v. *McKinney, supra*, 413 F.2d at 326, cautioned that:

> Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. *Cf. Phillips* v. *United States*, 1941, 312 U.S. 246, 251, 61 S. Ct. 480, 85 L. Ed. 800.

7 Although the State can label the anti-pass through provision any way it wishes, for the purpose of determining the applicability of 28 U.S.C. § 1341, the Federal definition of tax is to be employed. *Robinson Protective Etc.* v. *City of Philadelphia*, 581 F.2d 371, 375 (3d Cir. 1978).

the state legislature to impose the gross receipts tax on oil companies *only* if it can in addition impose controls on the prices charged by the companies for products sold in New York State. The statement of legislative findings and declaration of purpose, following discussion of the State's mass transit fiscal crisis, provides that:

> It is also found that oil companies are currently reaping historically high profits. These increased profits do not result from the application of normal management techniques and strategies which any business uses to maximize profits, but rather result from the market conditions prevailing within the international oil industry, which are artificially inflating the price of petroleum products. In view of the high cost of petroleum, the importance of energy conservation and New York's dependence upon foreign energy suppliers, *oil companies have become businesses clothed with a public interest*. (Emphasis supplied)

L. 1980, ch. 272, § 1.

The statement goes on to indicate an awareness on the part of the Legislature of the problems involved in supporting a mass transportation system in light of the "economic recession" and "Inflationary cycle". *Id.* The Legislature, having determined that it did not wish to contribute to the "inflationary spiral" or "contribute to further increases in the price of petroleum products to consumers" expressed the following legislative intent:

> The legislature hereby determines and declares that it is the public policy of the state to tax the gross receipts of oil companies and at the same time to prevent such gross receipts tax from fueling inflation by prohibiting the pass through of such tax to the consumers of this state.
>
> Therefore, it is the intent of the legislative that the gross receipts tax shall cease and terminate if such tax shall be permitted, either by judicial adjudication or by any formal opinion or ruling or in any other manner, to be included either directly or indirectly in the sales price of the products of the oil company.

The foregoing language suggests to the Court that the Legislators anticipated that the anti-pass through provision of the legislation might be challenged, apart from any attack on the tax itself, and that it might be struck down by the Courts with no threat to the continued collection of the tax. The fact that the State chose to make the taxes' survival dependent upon the survival of a provision which constitutes an exercise of the State's police power rather than taxing power does not, in the opinion of this Court, justify the application of the Tax Injunction Act.

The Court does not question the State's authority to enact a taxing statute, the survival of which is inextricably linked to the survival of legislation constituting an exercise of the State's police power. However, it does not accept the defendants' argument that the question of constitutionality of such an exercise of police power can be insulated from Federal judicial scrutiny through a legislatively imposed linkage with a state taxing measure.[8] Therefore, the Court finds that it has jurisdic-

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8 In seeking dismissal of these actions under 28 U.S.C. § 1341, defendants ask the Court to closely examine the long history of hostility to government by Federal injunction and the traditional Federal policy of non-intervention in certain state governmental matters.

In that regard, defendants point to the enactment of the Norris-LaGuardia Act of 1932 (29 U.S.C. §§ 105-115), which restricts the Federal Courts' power to issue injunctions in labor disputes and the Johnson Act of 1934, 28 U.S.C. § 1342, which prohibits Federal Courts from issuing injunctions of public utility rate orders and after which the Tax Injunction Act was "modeled". 81 Cong. Rec. 1415 (1937).

It is interesting to note, in that regard, that the Johnson Act, which deals with what are in effect price control measures (public utility rates) precludes the issuance of Federal Court injunctions only if "[t]he order does not interfere with interstate commerce". 28 U.S.C. § 1342(2). The Tax Injunction Act, of course, contains no such exception. While it is conjecture on the part of this Court, it would appear that Congress, in passing the Tax Injunction Act, anticipated that it would be applicable only in situations involving a state's internal fiscal affairs. Price controls, however, by their very nature are more apt to have an effect which reaches outside of the boundaries of the State, thus calling for the exception in the Johnson Act, and perhaps bolstering the Court's determination in these cases.

tion in these actions under 28 U.S.C. §§ 1331, 1337, 2201 and 2203 and hereby denies the defendants' motion to dismiss pursuant to the Tax Injunction Act.

SUPREMACY CLAUSE

Plaintiffs seek judgment invalidating the anti-pass through provision on the grounds that it is pre-empted by the EPAA and the price control regulations promulgated thereunder and is thus void under the Supremacy Clause of the Constitution.

The Supremacy Clause provides that ". . . the Laws of the United States . . . shall be the supreme Law of the Land, . . . any thing in the Constitution or Laws of any State to the contrary notwithstanding." (U.S. Const. Art. VI, cl. 2).

The Supreme Court has frequently cautioned that in cases such as these involving a challenge to a State's police power under the Supremacy Clause that the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L. Ed. 2d 179 (1978), quoting from *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604, *reh'g. denied* 431 U.S. 925 (1977).

There are two recognized grounds for finding preemption of state legislation by federal law.[9] The first is where Congress has chosen to completely occupy the field, to the exclusion of the states, in which case states may not regulate within the field even when the regulation is in harmony with the federal scheme. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525, 97 S. Ct. at 1309. The second is where, although Congress has not

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9 State statutes can also be pre-empted by Federal regulations properly promulgated under a Federal statute where there is a conflict between State and Federal regulations. *See e.g. Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 536, 97 S. Ct. at 1315.

completely foreclosed state legislation in a particular area, the state law conflicts with a valid federal statute. *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158, 98 S. Ct. at 994.

Congressional intent to totally occupy a particular field, precluding any state regulation may be "explicitly stated in the [federal] statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525, 97 S. Ct. at 1309. *See also City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S. Ct. 1854, 1859, 36 L. Ed. 2d 547 (1973).

The Supreme Court in *Rice* v. *Santa Fe Railroad*, *supra*, 331 U.S. at 230, 67 S. Ct. at 1152, explaining that an implied congressional intent could be "evidenced in several ways", stated that:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. [Citations omitted] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Citations omitted] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[10]

Under the second form of pre-emption, conflict voiding a state statute will be found:

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10 It must be kept in mind, however, that the existence of pervasive and complex regulations does not, in every case, demonstrate a Congressional intent to completely occupy a particular field. *See New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415, 935 S. Ct. 2507, 2514, 37 L. Ed. 2d 688 (1973), in which the Supreme Court cautioned that:

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . . .

> "where compliance with both federal and state regulations is a physical impossibility. . . ," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, *supra*, at 526, 540-541. *Accord*, *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976).

Ray v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158, 98 S. Ct. at 944-995.

On occasion a pre-emption conflict may be found absent an actual conflict between state and federal law, where it is clear that Congress has addressed the issue and decided that the particular field should remain unregulated. As explained by the Supreme Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S. Ct. 1026, 1030, 91 L. Ed. 1234 (1967) and recently reiterated in *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 178, 98 S. Ct. at 1004-1005:

> "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

However, as recently pointed out by Judge Blumenfeld in *Mobil Oil Corp.* v. *Dubno*, No. H-80-359 (D. Conn. July 9, 1980) a Connecticut case also involving an anti-pass through provision enacted in conjunction with a gross receipts tax on oil companies in that State:

> [the] mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy. Rather, "[t]he pertinent inquiry [is] whether [fed-

> eral authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by Congress, and, after balancing the competing interests whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals. *Ray* v. *Atlantic Richfield Co.*, . . . at 174, 177. . . .

Id., Slip Op. at 13.

Finally, it should be noted that a state law cannot escape invalidation on pre-emption grounds because its purpose promotes a valid state interest if its effect "frustrates the full effectiveness of federal law." *Perez* v. *Campbell*, 402 U.S. 637, 651-652, 91 S. Ct. 1704, 1712, 29 L. Ed. 2d 233 (1971).

The Court explained in *Perez* that:

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentically [sic] furthered by the proposed state law.

Plaintiffs will be entitled to summary judgment on their pre-emption claims pursuant to Rule 56 of the Fed. R. Civ. P. "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving [parties are] entitled to judgment as a matter of law". Fed. R. Civ. P. 56(c).

After review of the papers submitted by the parties to the actions and analysis of the EPAA and the Price Regulations promulgated thereunder, the Court is of the opinion that there

are no genuine issues as to any material fact on the pre-emption issue, and finds that plaintiffs are entitled to summary judgement on that claim.[11]

THE EPAA AND THE FEDERAL REGULATORY SCHEME

The Emergency Petroleum Allocation Act

Congress enacted the EPAA in 1973 in response to the Arab oil embargo which had created shortages of various petroleum products which "constitute[d] a national energy crisis which [was] a threat to the public health, safety, and welfare and [could] be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government." 15 U.S.C. § 751(a)(3).

The stated purpose of the Act was to:

> . . . grant the President of the United States and direct him to exercise specific temporary authority to deal with *shortages* of crude oil, residual fuel oil, and refined petroleum products or *dislocations in their national distribution system*. . . . [Emphasis supplied]

15 U.S.C. § 751(b).

As indicated in the preceding statutory language, the EPAA was initially considered by Congress to be a temporary measure enacted to deal with an emergency situation on a national level.

The President was required under the Act, to:

> promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product in amounts specified in (or determined

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11 There is no question but that the legal issues raised in plaintiffs' pre-emption claims are complex. The Second Circuit, however, in *S.E.C.* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) has made it clear that summary judgment is not necessarily inappropriate simply because the legal issues are complex.

> in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

15 U.S.C. § 753(a).

Authorization was granted under the EPAA for the President to delegate his authority under the Act "to such officers, departments or agencies of the United States, or to any State (or officer thereof), as he deems appropriate." 15 U.S.C. § 754(b).

The Department of Energy (DOE), was created by Congress in August of 1977 (Department of Energy Organization Act, Pub. L. No. 95-91, § 201, 91 Stat. 569 (1977)), and in February of 1978, the President delegated his authority under the Act to the Secretary of Energy who at the present time has control over the mandatory allocation program. Exec. Order No. 12038, 43 Fed. Reg. 4957 (Feb. 7, 1978).[12]

While the actual promulgation of regulations under the EPAA was left to the President, Congress did set forth guidelines defining the requisite area of coverage in the form of objectives which the regulations were to provide for "to the maximum extent practicable." 15 U.S.C. § 753(b)(1). Those objectives, set forth at 15 U.S.C. § 753(b)(1)(A)-(I) are:

> (A) protection of public health (including the production of pharmaceuticals), safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or

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12 The President first delegated his authority under the EPAA to the Federal Energy Office (FEO) in December of 1973, Exec. Order No. 11748, 38 Fed. Reg. 33575. In June of 1974 the President abolished the FEO and delegated his authority to the Federal Energy Administration (FEA), which had been created by Congress in the Federal Energy Administration Act of 1974, Pub. L. 93-275, § 3, 88 Stat. 97 (1974). Exec. Order No. 11790, 39 Fed. Reg. 23185 (June 27, 1974). Authority remained in the (FEA) until delegated to the Secretary of Energy in 1978.

investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto.

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Congress, in addition, directed that:

> In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section—
>
> (A) shall provide for a dollar-for-dollar pass through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level. . . .

In 1975, Congress added 15 U.S.C. § 760(a) to the EPAA. Energy Policy and Conservation Act, Publ. L. No. 94-163, 89 Stat. 871 (1975). Whereas the imposition of allocation and price controls was mandatory under the 1973 Act, this section gave the President the authority to, in his discretion, and in accordance with the guidelines and procedural requirements set forth in the law, exempt "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from the price and allocation regulations under the EPAA.

The criteria for amendment of regulations under § 753(a) is a determination by the President that:

> such amendment is consistent with the attainment to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title and that the regulation, as amended, provides for the attainment to the maximum extent practicable, of such objectives.

15 U.S.C. § 760a(b).

Before any amendment to the regulations which pertains to either the allocation of or the price or manner of determining the price of crude oil, residual fuel oil or refined petroleum product could be promulgated, it had to be submitted for Congressional approval. 15 U.S.C. § 760a(C)(1) and (2).[13]

The President was also required to submit in support of the proposed amendment "a finding that such amendment [was] consistent with the attainment of the objectives specified in

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13 Effective May 31, 1979, proposed amendments exempting products from the mandatory allocation and price regulations need not be submitted for Congressional approval. 15 U.S.C. § 760g; 44 Fed. Reg. 19425 (1979).

section 753(b)(1) of this title," and in the case of a proposed amendment to the price control regulations, "a finding that market forces [were] adequate to protect consumers and that exempting such oil or refined product category [would] not result in inequitable prices for any class of users of such oil or product." 15 U.S.C. § 760a(d)(1).

In addition, the President was required to submit with each proposed amendment a statement of his views as to:

> the potential economic impact (if any) of such amendment which, where practicable, shall include his views as to—
>
> (i) the State and regional impacts of such amendment (including effects on governmental units);
>
> (ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as a fuel or as feedstock for industry; and
>
> (iii) the effects on employment and consumer prices; and
>
> (B) in the case of an exemption [from the price control regulations] an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

15 U.S.C. § 760(a)(d)(2).

Under the 1975 amendment to the EPAA, the President was also given standby authority to at any time reimpose allocation and price control regulations on any previously exempted oil or refined product "upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 753(b)(1) of this title." 15 U.S.C. § 760a(f).

Federal Regulation Under the EPAA

Comprehensive regulations governing the allocation and pricing of petroleum products were promulgated and implemented in response to the EPAA mandate. The petroleum pricing regulations, at subpart E, 10 C.F.R. §§ 2121.81-85 control the prices charged by refiners for petroleum products and specify the method to be used in computing price increases.

Under the pricing regulations the "maximum allowable price" which refiners can charge for covered products is "the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, . . . plus increased product costs and increased non-product costs incurred between the month of measurement and the month of May 1973." 10 C.F.R. § 212.82.

Initially, the regulations allowed refiners to pass-through non-product costs only upon notification to and approval of the FEA, the agency to which the President had first delegated his authority under the EPAA. However, in December of 1974 the FEA amended the regulations by recognizing eight specific categories of increased non-product costs, which refiners could pass-through without prenotification. 39 Fed. Reg. 42368 (December 5, 1974). The amendment also left the door open to seek agency permission for the passthrough of "disproportionately high non-product costs increases which [did] not fall into one of the categories defined by FEA," on a case-by-case basis. *Id.*

In January of 1977, the regulations concerning the pass-through of non-product costs were further amended to add additional categories.[14] 42 Fed. Reg. 5023 (January 27, 1977). As a result of this amendment, refiners were and are presently allowed to include in the price of covered products the dollar amount of their increased costs for "federal, state, and local

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14 For a complete list of non-product costs which may be included in the price of covered products see 10 C.F.R. § 212.83(c)(2)(iii)(E).

property, excise, franchise and other similar taxes." 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The regulation specifically provides that "[f]ederal, state and local income taxes are not includable in this amount." *Id.*

The regulations also dictate the manner in which allowable cost increases are to be allocated among a refiner's customers. 10 C.F.R. § 212.83(c) and (h). The "equal application rule," at 10 C.F.R. § 212.83(h) encourages refiners to allocate increases equally among classes of purchasers by requiring that the refiner in determining the amount of its unrecouped cost increases to arrive at the maximum allowable price which can be charged in the subsequent month,

> . . . shall calculate its revenues as though the greatest amount of increased costs actually added to any May 15, 1973, selling price of the product concerned and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973, selling price of that product and included in the price charged to each class of purchaser.

Id.

In other words, even if a refiner has not applied cost increases equally among all classes of purchasers, the refiner will be *deemed* to have done so and will not have the deemed amounts available for further increases.[15]

At the present time only automotive gasoline, propane and certain natural gas liquids remain subject to the previously described price control regulations (10 C.F.R. §§ 210.35, 212.56-62); all other petroleum products having been exempted

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15 The non-product cost increases cannot necessarily be included in product prices immediately as incurred. Rather the costs are placed in the refiners "bank," to be passed through in accordance with the price control regulations at 10 C.F.R. § 212.83(c). Both actual price increases and increases deemed to have occurred under the equal application rule reduce the amount in the refiners "bank." Thus, a refiner is penalized for failure to apply cost increases equally to all classes by the reduction in its "bank" for cost increases not actually made.

The regulations at 10 C.F.R. § 212.83(f) set forth the sequence in which increased costs shall be deemed to have been recovered.

in accordance with the procedures set forth at 15 U.S.C. § 760a.[16]

In each instance in which an administrative decision has been made to exempt a particular petroleum product from regulation, it has been based upon findings (1) that the product is not in short supply; (2) that deregulation will not have an adverse impact on supply; (3) that competition and market forces provide adequate protection for consumers (or possibly greater protection); (4) that exemption will not result in inequitable prices for any class of users; and (5) that exemption is consistent with the attainment of the objectives set forth at section 4(b)(1) of the EPAA.

It should be noted that the price control regulation on presently exempt petroleum products have not been repealed, but rather have been "in effect converted to standby status, so that in the event of shortages or other occurrences which might require reimposition of controls, they may be quickly put into effect." 41 Fed. Reg. 30096, 30098 (July 22, 1976).[17]

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16 The products which have been exempted are residual fuel oil, 41 Fed. Reg. 13896 (April 1, 1976); No. 2 heating oil and No. 2-D diesel fuel, 41 Fed. Reg. 24518 (June 16, 1976); No. 1 heating oil, No. 1-D diesel fuel and kerosene, 41 Fed. Reg. 24518 (June 16, 1976); naphthas, gas oils, benzene, greases, hexane, lubricant base oil stocks, lubricants, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products, 41 Fed. Reg. 30096 (July 22, 1976); aviation turbine fuel (naphtha-based and kerosene-base) 41 Fed. Reg. 40452 (Sept. 20, 1976); aviation fuel (kerosene-type) and aviation gasoline, 44 Fed. Reg. 7070 (Feb. 5, 1979); and butane and natural gasoline. 44 Fed. Reg. 70118 (Dec. 6, 1979); Codified at 10 C.F.R. § 210.35.

17 41 Fed. Reg. 30096, 30098 (July 22, 1976) concerns the exemption from price controls of naphthas and gas oils. The agency reports on the exemption of other products contain similar language concerning the conversion of the regulations to standby status. See n. 16, *supra*, for Federal Register citations relating to specific exemption determinations.

ANALYSIS OF PLAINTIFFS' PRE-EMPTION ARGUMENT

The anti-pass through provision contained in the New York gross receipts tax legislation applies both to petroleum products which are currently subject to the federal price control regulations and those which are presently exempt. Plaintiffs' pre-emption claims extend to both.

Applicable Test of Pre-emption

Plaintiffs rely upon both of the judicially recognized grounds for pre-emption of state law by Federal statutes and regulations. Defendants, however, contend that the question of pre-emption is not to be resolved through application of the "exclusive occupation" or "conflict" tests repeatedly articulated by the Supreme Court in Supremacy Clause cases, but rather exclusively through application of section 6(b) of the EPAA, 15 U.S.C. § 755(b). That section provides that:

> The regulation under section 753 of this title and any order issued thereunder, shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

Furthermore, defendants assert that the term "conflict" as used in section 6(b) is restricted to *actual* conflicts. Thus, according to defendants, the traditional judicial use of the term "conflict" as including instances where the consequences of a state law "sufficiently injure the objectives of the federal program," *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 583, 99 S. Ct. 802, 809, 59 L. Ed. 2d 1 (1979) is improper in these cases.

Defendants in asserting their position, rely on state court cases interpreting section 6(b) as well as a letter written by the Acting General Counsel of the DOE applying the actual conflict standard. Plaintiffs dispute the correctness of defendants' definition of "conflict" in section 6(b) and argue that, in

any event, the section does not constitute the sole test of pre-emption in these cases. The Court agrees.

Any possibility that the existence of a specific pre-emption provision in Federal legislation precludes application of the general pre-emption principles is quickly dispelled by the decision of the Supreme Court in *Jones* v. *Rath Packing Co.*, *supra*. The Court in *Jones*, after concluding that an express pre-emption provision did not invalidate a state law, found that the finding did not resolve the case because the Court still had to "determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* 430 U.S. at 540-541, 97 S. Ct. at 1317.

Defendants' reliance on *Governor of the State of Maryland* v. *Exxon*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd on other grounds*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) which found section 6(b) provided the sole test for pre-emption is misplaced, since that case was decided prior to *Jones* which dictates a contrary result.

Nor does the letter written by the Acting General Counsel for DOE in which he, relying exclusively on the section 6(b) pre-emption test, opined that the state anti-pass through provision did not conflict with the EPAA and its regulations, dictate a finding by this Court that section 6(b) provides the exclusive pre-emption test.[18] While interpretation of statute by the agency charged with its administration is "entitled to substantial deference," *Quern* v. *Mandley*, 436 U.S. 725, 738, 98 S. Ct. 2068, 2076, 56 L. Ed. 2d 658 (1978), it is clearly not decisive in every instance. The Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944), explained that:

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18 The letter was written by Eric J. Fygi, Acting General Counsel of the DOE on June 10, 1980, in response to a letter of the same date from the Governor of New York State, seeking an opinion as to whether the anti-pass through provision would conflict with the EPAA and the regulations promulgated thereunder.

Although section 6(b) was not specifically referred to, it is clear that it was relied upon exclusively by Mr. Fygi in reaching his determination.

> . . . rulings, interpretations and opinions of the Administrator under [an] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade if lacking power to control.* (Emphasis supplied)

Before applying the foregoing standard to the Acting General Counsel's letter in this case, it should be pointed out that the DOE itself places relatively little weight on communications of this type. The regulations at 10 C.F.R. §§ 205.80-.86 set forth the procedure for obtaining official DOE interpretations. Those procedures were not followed with regard to the opinion letter relied on by defendants in these cases. With respect to the type of opinion letter relied upon by the defendants herein, 10 C.F.R. § 205.80 provides that:

> Responses, which may include verbal or written responses to general inquiries or to other than formal written requests for interpretations filed with the General Counsel or his delegate or a Regional Counsel, *are not interpretations and merely provide general information.* (Emphasis supplied)

Under the *Skidmore* test, the opinion letter is entitled to little weight with regard to the pre-emption issue. After concluding that the anti-pass through provision was not pre-empted by Federal law, the author of the letter offered three caveats, one of which was that the time constraints he was under in responding to the request for an opinion, "did not permit an exhaustive analysis of the question." Thus, by his own admission, the Acting General Counsel's consideration of the pre-emption issue was less than thorough.

Furthermore, as shall be demonstrated at a later point, the conclusion reached in the letter is inconsistent with expressions

of agency policy contained in several earlier DOE administrative opinions. Finally, the Court is convinced that the conclusion in the letter was, in light of *Jones*, reached either without reference to, or through the incorrect application of, judicially determined pre-emption principles.

Thus, the plaintiffs are not limited to section 6(b) in pursuing their pre-emption claims but rather are free to rely upon both of the judicially accepted grounds for pre-emption as well. However, since the Court is of the opinion that the anti-pass through provision must be invalidated under the "conflict" standard, it will be unnecessary to determine whether Congress intended exclusive Federal control over the allocation and pricing of petroleum products, excluding the State from exercising its police power in those areas.[19]

The Pre-emption Conflict as to "Non-Exempt" Petroleum Products

As one of the sponsors of the EPAA, Senator Henry Jackson stressed that it was crucial that Congress "build a coordinated and rational fuels and energy policy." 119 Cong. Rec. 12317, *quoted in* S. Rep. No. 93-159, 93d Cong., 1st Sess. 21 (1973). Later, as floor manager of the bill, the Senator warned that:

> [I]f the Federal Government fails to establish effective regional or national allocation plans, we will invite piecemeal action by the States. Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level.

119 Cong. Rec. 17764 (1973).

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19 In keeping with the traditional judicial reluctance to find Federal pre-emption of a State's exercise of police power (*see Ray* v. *Atlantic Richfield Co.*, *supra*), the Court has attempted to make its finding of pre-emption in these cases on as narrow a ground as possible. In any event, the fact that Congress included an express pre-emption provision which did not result in occupation of the entire field, makes it unlikely that plaintiffs would be successful on that pre-emption ground.

Recognizing that the "self-regulating laws of supply and demand [were] not currently operating in the petroleum product market," the House Committee on Interstate and Foreign Commerce concluded that it was "imperative that the Federal government . . . accept its responsibility to intervene in these markets to preserve competition." H.R. Rep. No. 93-159, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News, 2586.

As previously noted, one of the express statutory objectives to be considered in the promulgation of mandatory allocation and price regulations was the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States. 15 U.S.C. § 753(b)(1)(f). Explaining the Congressional intent with regard to equitable prices, the Congressional conferees stated that:

> The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages. *On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government.* Most importantly, the President must, in exercising his authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs. (Emphasis supplied)

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News 2702-2703.

Thus, it is clear that Congress looked upon the EPAA as legislation directing the establishment of a flexible national program for dealing with what was hoped to be a temporary crisis in an equitable manner, providing to the greatest extent possible for a balancing of the interests of both consumers and refiners of petroleum products.

Plaintiffs[20] contend that the anti-pass through provision stands as an obstacle to the fulfillment of that Congressional goal and charge more specifically that the provision conflicts with the mandatory Federal price regulations by not allowing refiners and sellers of petroleum products to recapture increased costs engendered by state franchise taxes on a dollar-for-dollar basis.[21] According to plaintiffs, the New York gross receipts tax is a franchise tax which falls within that group of taxes which may under the regulations be passed on to purchasers of petroleum products through increase in prices. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The anti-pass through provision, however, prevents the plaintiffs from passing on that cost in the prices charged for products sold within New York State.

Thus, recovery of increased costs incurred as a result of the gross receipts tax will be limited to amounts which could be passed through to purchasers in other states. However, plaintiffs argue that under the Federal regulations they will not be able to recover the entire amount from out-of-state purchasers because of the equal application rule. 10 C.F.R. § 212.83(h). Under that rule, as previously explained, New York prices would be deemed to have increased in the same amount as those in other states, and that amount would be lost from plaintiffs' "banks" and unavailable for future recovery.

Defendants argue in response that (a) the New York gross receipts tax is not one which may be passed on to purchasers under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), and (b) the Federal price control regulations merely set "maximum allowable prices" and bestow no right upon refiners and sellers to charge

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20 Plaintiff NEPCO alleges in its complaint that its New York sales are limited to residual fuel oil, presently exempt from regulation under the EPAA. Therefore, the discussion concerning non-exempt products does not apply to NEPCO.

21 Plaintiffs in the Mobil Oil case allege in addition that the anti-pass through provision conflicts with the mandatory price regulations by imposing a sequence of cost recovery in conflict with the sequence set forth in the Federal regulations at 10 C.F.R. § 212.83(f). It will, however, be unnecessary for the Court to reach that argument.

those prices.[22] The Court finds both of these arguments unconvincing.

In asserting the position that the New York gross receipts tax is not one which can be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), defendants argue that the intent behind the regulation allowing the pass through of certain taxes (i.e., property, excise, franchise and similar taxes) while not permitting the pass through of income taxes was to distinguish between those taxes which the taxing authority expected to be passed on and those which were to be born by the taxpayer. Defendants then reason that the regulation should, therefore, be read as a presumption to operate only in the absence of an explicit expression of intention. Defendants, however, fail to offer support for this theory.

Defendants also seem to suggest that the gross receipts tax, because it taxes *all* receipts and not merely receipts from sales, is actually along the lines of an income tax, and cannot be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) on that basis.[23] Neither is this claim convincing, especially in light

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22 Defendants also renew the argument first made in conjunction with the motion to dismiss that the anti-pass through provision is not a price control measure because although it admittedly has an incidental effect on price, it does not "fix" prices. Rather, defendants claim it is a "rule of tax incidence," and as such should not be pre-empted by Federal law in this instance.

The Court remains convinced that regardless of the terminology employed by defendants, the anti-pass through provision is indeed a price control measure. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940) (finding that under the Sherman Antitrust Act price fixing is not limited to the setting of uniform or inflexible prices); *Perez* v. *Campbell*, *supra*, 402 U.S. at 651-652, 91 S. Ct. at 1712 (pre-emption is not determined by reference to state statutory labels).

The anti-pass through, regardless of what defendants call it, "distorts market conditions by keeping prices artificially low in [New York]." *See Mobil Oil v. Dubno*, *supra*, Slip op. at 19 n. 10.

23 Defendants recognize that no deductions are allowed as they generally are with an income tax, but in support of their argument that the gross receipts tax is an income tax, justify the failure to allow deductions by the low tax rate.

of the following statutory language contained in the tax legislation:

> § 182 Additional *franchise tax* on certain oil companies. 1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company . . . *for the privilege of exercising its corporate franchise*. . . . (Emphasis supplied)

L. 1980, ch. 271, § 4.

The foregoing language establishes to the satisfaction of this Court that the gross receipts tax is a state franchise tax which falls within that group of taxes which may be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7).[24]

Defendants argue, however, that even if the regulation allows plaintiffs to increase prices of non-exempt petroleum products to reflect costs incurred by the New York gross receipts tax, it does not give them an absolute right to do so. Rather, according to defendants, the regulations merely establish "maximum allowable prices," and, therefore, no conflict is presented by the State's setting more restrictive price limitations. Defendants' position simply does not hold up under scrutiny.

As previously noted, Congress, in directing the President to promulgate mandatory allocation and price regulations under the EPAA, provided him with guidelines in the form of a list of objectives to be met to the "maximum extent practicable." 15 U.S.C. § 753(b)(1)(A)-(I). Therefore, in determining whether

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24 Defendants point out that 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) allows only taxes which are attributable to refining operations to be passed through. Since the New York gross receipts tax taxes all of an oil company's receipts, and not just those attributable to refining operations, defendants suggest that there is a material issue of fact precluding summary judgment as to what portion, if any, of the gross receipts tax can be passed through as attributable to refining operations.

The Court, however, does not agree that this question raises a material issue of fact. Even if oil companies could not pass through all of the costs incurred through the tax, any proportion allocatable to refining (and clearly some portion would be) which could be passed through but for the anti-pass through provision presents a conflict problem.

the anti-pass through provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Ray* v. *Atlantic Richfield Co.*, *supra*, the Court must look not only at particularly the regulation but at the objectives which the agency sought to further by its promulgation.[25] If the consequences of the anti-pass through provision "sufficiently injure the objectives of the federal program," *Hisquierdo* v. *Hisquierdo*, *supra*, a conflict must be found and the provision invalidated under the Supremacy Clause. Such a conflict exists in this instance with regard to non-exempt petroleum products.

The regulations involved in plaintiffs' pre-emption challenge are 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) and the equal application rule. 10 C.F.R. § 212.83(h). One of the objectives at 15 U.S.C. § 753(b)(1), the "preservation of an economically sound and competitive petroleum industry," [15 U.S.C. § 753(b)(1)(D)] is furthered by allowing refiners to pass through those taxes which are recognized as costs of doing business. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). By precluding the pass through of the New York gross receipts tax to purchasers in New York, the anti-pass through provision conflicts with the articulated policy allowing the pass through, and the more general Congressional intent that prices for petroleum products "be set . . . pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government." H.R. Conf. Rep. No. 93-628 *supra*.

Another of the objectives, set forth at 15 U.S.C. § 753(b)(1)(F), provides for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States." The equal application rule exists to help insure equitable pricing on a national basis.

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25 Referring to the objectives set forth at 15 U.S.C. § 753(b)(1), the Temporary Emergency Court of Appeals in *Mobil Oil* v. *Department of Energy*, 610 F.2d 796 (Temp. Emer. Ct. of Ap. 1979) explained that:

> No single factor is inherently more important than any of the other factors. Instead, as this Court has held, all nine factors are to be balanced objectively.

The application of the rule, and the detrimental effect that it would have on the oil companies' ability to increase prices on a dollar-for-dollar basis to cover costs incurred through the imposition of the New York gross receipts tax have already been explained.[26]

However, perhaps even more crucial than the harm which would be done to plaintiffs through application of the rule, which in itself suggests an impermissible conflict, is the fact that the anti-pass through provision flies in the face of the specific Congressional objective which the equal application rule was enacted to further. While the Federal policy supports "equitable distribution" and "equitable prices" among "all regions and areas of the United States," 15 U.S.C. § 753(b)(1)(F), New York is seeking to insulate its citizens from increased costs resulting from a local tax while allowing the burden of the tax to fall upon the shoulders of non-New Yorkers.[27]

Such a result frustrates not only express Congressional policy, but thwarts the articulated DOE policy of waiving the equal application rule and allowing local taxes to be passed through solely to customers within the taxing jurisdiction. In

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26 Defendants suggest that there is no conflict in these cases with regard to the equal application rule because plaintiffs presently have "banks" which are so large that it is unlikely they will be depleted by the time price controls expire in September of 1981, and the only material aspect of the rule is to reduce those "banks."

While defendants assert that the size of plaintiffs' "banks" raises a material issue of fact, the Court once again disagrees. The conflict exists regardless of the size of plaintiffs' "banks."

27 Defendants attempt to differentiate the New York gross receipts tax from other gross receipts taxes which have been imposed on oil companies primarily because it taxes *all* receipts from *all* sources. L. 1980, ch. 271 § 4.

However, the tax is limited through the application of a statutory formula to the portion of receipts allocated to the State of New York, making it, in effect, a local tax. The fact that it applies to all sources of income rather than only receipts from the sale of petroleum products suggests only that there will conceivably be sources of income upon which the tax must be paid but which will be unrelated to the EPAA or the mandatory price regulations.

Mobil Petroleum Company, 5 DOE § 81, 188 at 82, 989 (1977) the DOE found that a Guam gross receipts tax could be recovered solely in the taxing jurisdiction, reasoning that:

> [I]f Mobil Petroleum were required to recover a portion of the Guam gross receipts tax by increasing its prices for covered products sold to purchasers outside the territory of Guam, those non-Guamanian purchasers would in effect be required to bear a portion of the burden of a Guamian tax on Guamian consumption of petroleum products. *This result would frustrate one of the objectives that Congress sought to further in the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, that of providing for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States."* (citation omitted)

Because the anti-pass through provision conflicts in the manner discussed with 10 C.F.R. §§ 212.83(c)(2)(iii)(E)(7) and 212.83(h), as well as the aforementioned objectives at 15 U.S.C. § 753(b)(1)(D) and (F) and the Congressional intent as expressed in the legislative history, its validity cannot be upheld under the Supremacy Clause with regard to petroleum products presently subject to the mandatory price controls.[28]

The Pre-emption Conflict as to "Exempt" Petroleum Products

As already pointed out, the 1975 amendment to the EPAA gave the President, or his delegate, the authority to exempt

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28 Although compliance with the mandatory price control regulations and the anti-pass through provision would not be impossible so as to create an *actual* conflict under 15 U.S.C. § 755(6), as defendants suggest that section should be read, the anti-pass through provision would be pre-empted under that section by use of the judicially accepted definition of conflict in pre-emption cases.

The section refers only to programs "for the allocation of . . . petroleum products." However, legislative history suggests and defendants agree that programs for the pricing of petroleum products would be included.

petroleum products from regulation in accordance with the procedures contained in 15 U.S.C. § 760a. Many of the petroleum products subject to the New York gross receipts tax are presently exempt from regulation. As also previously noted, plaintiffs claim that the anti-pass through provision passed in conjunction with that tax is pre-empted as to those exempt products because it conflicts with the Federal regulatory policy under the EPAA.

An almost identical pre-emption issue was recently before the District Court in Connecticut in *Mobil Oil* v. *Dubno*, *supra*. The State of Connecticut enacted legislation imposing on oil companies a two percent tax on their gross receipts from sales in Connecticut. Section 13(a) of the Connecticut legislation contained a statement that the intent of the legislation was that the tax would constitute a part of each company's operating overhead. Section 13(b) forbids companies from raising wholesale prices in Connecticut on petroleum products presently exempt from regulation, by any higher amount than the average amount by which it raises prices "in all ports on the eastern coast of the United States." *Id.*, Slip op. at 2-3.

Judge Blumenfeld found that section 13(b) was a price control mechanism which frustrated the effectiveness of Federal law in a number of ways. He proceeded to declare the section unconstitutional as in violation of the Supremacy Clause.

There are obvious differences in the legislation, although none quite so drastic as defendants would have the Court believe. In fact, the Court sees none which in itself would dictate a contrary result in this action. If anything, the New York anti-pass through constitutes an even more imposing price control regulation in that it applies to both exempt and non-exempt petroleum products and, in addition, attempts to totally insulate New York from any of the burden of the tax, thus creating the possibility for even more severe market distortion than with the Connecticut case.

The decision in *Mobil Oil Corp.* v. *Dubno*, was reached after a thorough analysis of the legislative history of the EPAA, the statutory language, and the regulations themselves. As dis-

cussed below, this Court believes that the decision in *Dubno* is correct, and that Judge Blumenfeld's analysis is for the most part applicable in these cases.

Plaintiffs in these actions argue that in choosing to exempt certain petroleum products from price control regulations, the DOE (or predecessor agency) did not intend to cease regulating with regard to those products,[29] thereby presumably leaving the area wide open for the imposition of state regulation. Instead, plaintiffs contend, the Federal authorities have " 'addressed and acted upon the question,' " and after giving " 'careful consideration' to factors specified by Congress, they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals." *Mobil Oil Corp.* v. *Dubno*, *supra*, Slip op. at 13, *quoting in part from Ray* v. *Atlantic Richfield Co.*, *supra*.

Furthermore, plaintiffs assert, allowing operation of the anti-pass through provision would frustrate the satisfaction of the objectives set forth in the EPAA at 15 U.S.C. § 753(b)(1). There is ample support for plaintiffs' position in the legislative history of the Act, the statutory language and the manner in which the regulations have been converted to standby status with the DOE maintaining a close watch over supply and market conditions.

When enactment of the EPAA was originally being considered by Congress, the Committee conferees noted that:

> The committee recognizes that [price controls] necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of [EPAA] objectives.

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29 Plaintiffs in the Mobil Oil case rely for support on the decision in *Consumers Union of U.S., Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975) (en banc), in which a regulation which directed that prices be allowed to be determined by free market was still classified by the Court as a regulation within section 4(a) of the EPAA.

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973). Thus, it is clear that Congress considered price controls a necessary (but hopefully temporary) evil.

While the EPAA was enacted as a temporary measure to deal with a crisis situation during discussions, in 1975, concerning the enactment of the Energy Policy and Conservation Act (EPCA), Publ. L. No. 94-163, 89 Stat. 871 (1975), Congress recognized that:

> The fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations. *The Arab embargo raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level.* (Emphasis supplied)

H.R. Rep. No. 94-340, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Admin. News 1963.

The recognition on the part of Congress that the United States was entering a new era with regard to energy resources which necessitated a national energy policy belies defendants' argument that the 1975 amendment to the EPAA signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products.

While defendants correctly point out that in amending the EPAA in 1975, Congress intended "a gradual return to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975), the return to a petroleum market totally unfettered by Federal controls has not yet occurred even as to exempt products.

Just as the price control regulations themselves must provide for the satisfaction of the objectives set forth at 15 U.S.C. § 753(b)(1), any decision to exempt a product from the regulations must likewise be based upon "a finding that such amendment is consistent with the attainment of the objectives specified in section 753(b)(1) . . . ," 15 U.S.C. § 760a(d)(1). Therefore, exempting a product from the price control regulations,

rather than constituting an end to Federal regulation over those products, represents an affirmative administrative determination that "no such regulation is appropriate . . . pursuant to the policy of the statute . . . ," *Ray* v. *Atlantic Richfield Co., supra. See also Mobil Oil Co.* v. *Dubno, supra.*

Furthermore, agency action taken thus far under 15 U.S.C. § 760a has reflected a cautious, watchful approach to deregulation. As previously noted, price control regulations formerly applicable to presently exempt products have not been repealed but put on standby status to allow quick reactivation if necessary. In addition, the DOE has continued to closely monitor the market situation with regard to the exempt products.[30] This Court is not required to, nor is it in a position to, make a finding as to when, if ever, a return to an unregulated market will occur. It may be on September 30, 1981, the date presently set for expiration of Federal price controls. 15 U.S.C. § 760g. Then again, in light of the Congressional recognition that the United States has entered a "new era" necessitating "policy decisions [with regard to energy resources] at the national level," H.R. Rep. No. 94-340, *supra*, Federal control may extend far beyond that date.

In any event, at the present time, regulatory control over even the exempt petroleum products is, as previously demonstrated, still substantial. As with the Connecticut price control legislation, the anti-pass through provision in the New York gross receipts tax "frustrates the full effectiveness" of the present Federal regulatory policy under the EPAA in several ways.

Aside from imposing price controls in an area which Federal authorities have determined should be free of price regulation, the anti-pass through provision conflicts with the objectives which the Federal agencies were obligated to consider in making decisions to deregulate. Just as was recognized in *Mobil Oil Co.* v. *Dubno, supra*, Slip op. at 21:

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30 For example, a public hearing was scheduled in 1977 on the need for a price monitoring system for middle distillates. Such a system was adopted. 42 Fed. Reg. 54444 (Oct. 6, 1977).

> preventing suppliers from fully recovering, through prices charged in [New York], the true economic cost of products sold in [New York] . . . will induce suppliers to sell their products in other states, risking the very "supply problems" and "market distortions," the DOE in removing controls, endeavored to eliminate.

The provision presents a serious threat to the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States," 15 U.S.C. § 753(b)(1)(F), and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the EPAA. *Ray* v. *Atlantic Richfield Co., supra.*[31]

Because the anti-pass through provision conflicts with the Federal policy under the EPAA with regard to presently exempt petroleum products in the foregoing manner, its validity cannot be upheld under the Supremacy Clause.

RELIEF

This Memorandum-Decision explains the reasoning behind the September 4, 1980, Order of this Court, denying defendants' motion to dismiss and granting plaintiffs' motions for summary judgment declaring the anti-pass through provision of the New York gross receipts tax unconstitutional as in violation of the Supremacy Clause and enjoining its enforcement. The Court by this Memorandum-Decision reaffirms its findings as contained in the September 4, 1980, Order and hereby incorporates this Decision therewith.

IT IS SO ORDERED.

/s/ NEAL P. MCCURN
U.S. District Judge

Dated: September 19, 1981
Syracuse, New York

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31 Also relevant in this regard is the DOE policy favoring recovery of increased costs engendered from local taxes of the type involved herein, solely from purchasers in the taxing jurisdiction. *Mobil Petroleum Co., supra.* New York State seeks the exact opposite result.

Order of the United States District Court for the Northern District of New York in *Mobil Oil Corp., et al.* v. *Tully, et al.*, *New England Petroleum Corp.* v. *Tully, et al.*, and *Amerada Hess Corp.* v. *Tully, et al.*, Nos. 80 Civ. 543, 80 Civ. 544, 80 Civ. 570—September 4, 1980.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, UNITED REFINING COMPANY, INC. and GULF OIL COMPANY,

Plaintiffs,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants.

AMERADA HESS CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

ORDER

Defendants have moved for an order dismissing these three actions for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341. Plaintiffs in each action have moved for an order granting summary judgment in their favor. The Court has concluded after full hearing and after consideration of the arguments of counsel on both motions, the memoranda submitted therewith, both in support and opposition, and the exhibits attached thereto, that the defendants' motion to dismiss should be denied and that plaintiffs' motions for summary judgment should be granted and has further concluded that in the interests of judicial economy and in fairness to the litigants, this Order should be issued forthwith with a Memorandum-Decision containing the Court's findings of fact and conclusions of law to follow, as to avoid the need for the hearing scheduled for September 10, 1980, on plaintiff New England Petroleum Corporation's application for a preliminary injunction with a consolidated hearing on the merits. It is therefore

ORDERED, ADJUDGED AND DECREED that:

1. The defendants' motion to dismiss the plaintiffs' complaints in these three actions is denied;

2. The plaintiffs' motion for summary judgment (a) declaring the anti-pass through provision of section 182(12)(a) of the New York Tax Law as added by L. 1980 ch. 271 § 4, and ch. 272, § 2, invalid as pre-empted by the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h and the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, promulgated thereunder and thus void under the Supremacy Clause of the United States Constitution and (b) enjoining defendants, their delegates and successors in office from enforcing the anti-pass through provision against plaintiffs in these actions, are granted;

3. Entry of judgment in these actions is hereby stayed until September 17, 1980, and in the event that a Memorandum-Decision has not been issued by the Court by that time, the Court shall, upon notice to the parties, extend the stay until such time as a decision is issued and the defendants have had a reasonable time to seek a further stay from the United States Court of Appeals for the Second Circuit.

IT IS SO ORDERED.

/s/ Neal P. McCurn
U.S. District Judge

DATED: September 4, 1980
Syracuse, New York

CONSTITUTIONAL PROVISION

U.S. Const., Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES AND REGULATIONS

Economic Stabilization Act of 1970, *reprinted in* the notes following 12 U.S.C. § 1904

"§ 201. *Short title*

"This title may be cited as the 'Economic Stabilization Act of 1970'.

* * *

"§ 209. *Injunctions and other relief*

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§ 210. *Suits for damages or other relief*

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

* * *

"§ *211. Judicial review*

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the

determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

* * *

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court,

Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, *as amended by* the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163 (1975), 15 U.S.C. § 751 *et seq.*

§ 753. *Mandatory allocation*

Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products

(a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

* * *

§ 754. *Administration and enforcement; delegation of authority; civil and criminal penalties*

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973)

shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212 (b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

§ 755. *Impact on other laws*

* * *

Preemption of State or local allocation regulations and orders

(b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

* * *

§ 760g. Conversion date of Presidential authority from mandatory to discretionary to promulgate, etc., regulation; termination date of Presidential authority limitations; expiration date of Presidential authority to promulgate, etc., regulation or issue order; effect on pending actions

Notwithstanding any other provision of this chapter, at midnight on the conclusion of the 40th month in which the amendment under section 757(a) of this title is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 753(a) of this title shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 753(b)(2), 757 and 758 of this title shall terminate. The author-

ity to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

Tax Injunction Act, 28 U.S.C. § 1341

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

June 25, 1948, c. 646, 62 Stat. 932.

Petroleum Price Regulations, 10 C.F.R. § 212.83

§ 212.83 *Price rule.*

(a) *General rule.* (1) *Rule.* A refiner may not charge to any class of purchaser a price for a covered product in excess of the maximum allowable price except as provided in paragraph (a)(4) of this section.

* * *

§ 212.83(c)(2)(iii)(E)

* * *

$E_n{}^t$ is the total increased non-product costs (excluding marketing cost increase, which is included in "$F_1{}^t$") of the type "n" incurred during the period "t"; provided that such costs are included only to the extent that such costs are attributable to refining operations during the period "t" under the generally accepted accounting practices historically and consistently applied by the firm concerned or as otherwise provided in this § 212.83(c)(2) (iii)(E) and are not included in computing May 15, 1973 prices or in computing increased product costs.

* * *

(7) *Federal, state and local tax cost increase.*

(i) Federal, state and local tax cost increase is computed by applying the formula for "E_nT" above. For purposes of this computation "C" refers to the dollar amount of federal, state, and local property, excise, franchise and other similar taxes incurred. Federal, state, and local income taxes are not includible in this amount.

NEW YORK STATUTE

New York L. 1980, chs. 271, 272*

CHAPTER 271

An Act to amend the state finance law, in relation to establishing the regional transportation operating and capital assistance fund; to amend the tax law, in relation to imposition of an additional franchise tax on certain companies and providing for the deposit of revenues collected thereby; to amend the energy law, in relation to making certain conforming changes therein and making an appropriation from the regional transportation operating and capital assistance fund for the purpose of supplementing payments for operating assistance.

Approved June 13, 1980, effective as provided in section 12.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The state finance law is amended by adding a new section seventy-two-a to read as follows:

§ *72-a. Regional transportation operating and capital assistance fund*

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the state comptroller a special fund to be known as the "regional transportation operating and capital assistance fund".

2. Moneys in the regional transportation operating and capital assistance fund shall be kept separately from and shall not be commingled with any other moneys in the joint or sole

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* Changes or additions in text are indicated by *italics* and deletions are indicated by ~~strikeouts~~.

custody of the state comptroller or the commissioner of taxation and finance.

3. Moneys of the fund, following appropriation by the legislature, shall be allocated upon the certification of approval of availability by the director of the budget solely for the transportation operating and capital assistance purposes set forth within the specific accounts contained within the fund established by this section.

4. The regional transportation operating and capital assistance fund shall consist of separate and distinct accounts one of which shall be known as the "statewide mass transportation operating assistance account". Moneys in the account shall be kept separately from and not commingled with any other moneys in the regional transportation operating and capital assistance fund.

5. The statewide mass transportation operating assistance account shall consist of the revenues required to be deposited therein pursuant to the provisions of section one hundred eighty-two of the tax law and all other moneys credited or transferred thereto from any other fund or source pursuant to law.

6. Moneys in the statewide mass transportation operating assistance account shall be paid on a quarterly basis or in such other manner and at such times as the commissioner of transportation with the approval of the director of the budget may provide in accordance with a schedule as specified by appropriation for the payment of operating costs of public mass transportation systems within the state.

7. Any such moneys in the regional transportation operating and capital assistance fund and in any of the accounts in such fund may, at the discretion of the state comptroller, be invested in securities and obligations as defined by section ninety-eight of this chapter.

8. No municipality receiving funds hereunder shall utilize such funds for all or any part of the local share for state

financed and administered programs that require such a local share.

§ 2. Section one hundred seventy-one-a of the tax law, as added by chapter sixty-nine of the laws of nineteen hundred seventy-eight, is amended to read as follows:

§ 171-a *Deposit and disposition of revenue*

All taxes, interest, penalties and fees collected or received by the tax commission under articles nine (*except section one hundred eighty-two thereof*), nine-a, nine-b, nine-c, ten-c, twelve-a, thirteen, sixteen, sixteen-a, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-six, twenty-six-a, twenty-eight, thirty-one, thirty-two, and thirty-three of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds or reimbursements under such articles of this chapter and article ten thereof out of which amount the comptroller shall pay any refunds or reimbursements to which taxpayers shall be entitled under the provisions of such articles of this chapter and article ten thereof. The tax commission and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to his credit on the last day of such preceding month.

3. Such law is amended by adding a new section one hundred eighty-two to read as follows:

§ 182. *Additional franchise tax on certain oil companies*

1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the state as hereinafter provided, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its taxable years. In no event shall the tax imposed by this section be less than two hundred fifty dollars.

2. As used in this section: (a) The term "oil company" means every corporation formed for or engaged in the business of importing or causing to be imported into this state for sale in this state, extracting, producing, refining, manufacturing, compounding or selling petroleum. However, a corporation which is neither formed for nor engaged in the business of extracting, producing, refining, manufacturing or compounding petroleum but is solely engaged in the business of selling petroleum (whether imported or not) or other products or services and has sold in this state sixty million gallons or less of petroleum during its immediately preceding taxable year applicable under the tax imposed on it by article nine or nine-a of this chapter (or reasonably expects such sales in its current taxable year if such taxable year is the corporation's first taxable year applicable under the tax imposed on it by article nine or nine-a of this chapter) shall not be considered an oil company. Provided, further, a corporation which is principally engaged in selling fuel oil (excluding diesel motor fuel) used for residential purposes shall not be considered an oil company. For purposes of this section, petroleum shall include, but shall not be limited to, gasoline, aviation fuel, kerosene, diesel

motor fuel, benzol, distillate fuels, residual oil, crude oil or any similar product.

(b) The term "gross receipts" means all receipts, whether from within or without the United States, whether in cash, credits or property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expense whatsoever but excluding such receipts which constitute consideration received by the oil company for the issuance or sale of shares of its capital stock or money lent to such company. Receipts received by reason of any sale of fuel oil (excluding diesel motor fuel) used for residential purposes shall not be included in gross receipts. Provided, however, gross receipts shall not include the receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section. It shall be presumed that no receipts are receipts from a sale for resale to such purchaser unless such purchaser furnishes the oil company with a resale certificate in such form and under such terms and conditions as the tax commission may prescribe and such certificate is accepted in good faith by such oil company.

(c) The term "corporation" includes a corporation, joint stock company or association and any business conducted by a trustee or trustees wherein interest ownership is evidenced by certificate or other written instrument.

(d) The term "taxable year" means the oil company's taxable year for federal income tax purposes, or the part thereof during which such oil company is subject to tax under this section.

3. The portion of the gross receipts of an oil company to be allocated within the state shall be determined as follows: multiply its gross receipts by an allocation percentage to be determined by ascertaining the percentage which the receipts of such oil company, computed on the cash or accrual basis according to the method of accounting used in the computation of its gross receipts, arising during the period covered by

its report from (a) sales of its tangible personal property where shipments are made to points within this state, (b) services performed within the state, (c) rentals from property situated, and royalties from the use of patents or copyrights, within the state, and (d) all other business receipts earned within the state, bear to the total amount of the oil company's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and all other business transactions, whether within or without the state. Receipts received by reason of any sale of fuel oil used for residential purposes shall be included as a receipt in the computation of the allocation percentage.

4. Every oil company subject to tax under this section shall keep such records of its business in such form as the tax commission may require, and such records shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

5. Every oil company subject to tax hereunder shall annually file on or before the fifteenth day of the third month following the close of its taxable year a return which shall state the gross receipts for the period covered by such return. Returns shall be filed with the tax commission in a form prescribed by it setting forth such information as the tax commission may prescribe. Every oil company subject to tax hereunder which ceases to exercise its franchise or to be subject to the tax imposed by this section shall transmit to the tax commission a return on the date of such cessation or at such other time as the tax commission may require covering each year or period for which no return was theretofore filed. Notwithstanding the foregoing provisions of this subdivision, the tax commission may require any oil company to file an annual return, which shall contain any data specified by it, regardless of whether the oil company is subject to tax under this section.

6. At the time of filing the return required by this section, each oil company shall pay to the tax commission the tax

imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed (determined without regard to any extension of time for filing the return). For provisions relating to payment of tax where there have been payments of estimated tax, the provisions of subdivision four of section one hundred ninety-seven of this chapter shall be applicable.

7. If any provision of this section conflicts with any other provision contained in this article, the provisions of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall apply with respect to the taxes under this section, insofar as they are, or may be made, applicable.

8. Any corporation which is subject to tax under section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five, one hundred eighty-six or one-hundred eighty-six-a of this chapter shall not be subject to tax under this section.

9. An oil company which is not incorporated or organized under the laws of this state shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in this state, for the purposes of this section, by reason of (a) the maintenance of cash balances with banks or trust companies in this state, or (b) the ownership of shares of stock or securities kept in this state, if kept in a safe deposit box, safe, vault or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (c) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such oil company, or (d) the maintenance of an office in this state by one or more officers or directors of the oil company who are not employees of the oil company if the company otherwise is not doing business in this state, and does not employ capital or

own or lease property in this state, or (e) the keeping of books or records of an oil company in this state if such books or records are not kept by employees of such oil company and such oil company does not otherwise do business, employ capital, own or lease property or maintain an office in this state, or (f) any combination of the foregoing activities.

10. Any receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by any court, who conducts the business of any oil company shall be subject to the tax imposed by this section in the same manner and to the same extent as if the business were conducted by the agents or officers of such oil company. A dissolved oil company which continues to conduct business shall also be subject to the tax imposed by this section.

11. Where a false or fraudulent resale certificate has been furnished to an oil company, the corporation furnishing such certificate shall be subject to a penalty equal to three per centum of the gross receipts which would have otherwise been taxable to such oil company if such certificate had not been furnished to such company. Such penalty shall be assessed, collected and paid in the same manner as the addition to tax with respect to a deficiency due to fraud provided for in subsection (c) of section one thousand eighty-five of this chapter is assessed, collected and paid.

12. (a) The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state. In addition to the return required to be filed pursuant to subdivision five of this section, every oil company subject to tax under this section shall file, at the time such return is required to be filed (without regard to extensions), a report with the commissioner of taxation and finance certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state the tax imposed by this section and any penalty which may be assessed under this subdivision. However, if an oil company

was not subject to tax under this section for the preceding taxable year, if any, such company shall file at the time the return is required to be filed pursuant to subdivision five of this section (without regard to any extensions), a report with such commissioner certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state for the period beginning one month after the date this section became law and ending on the last date of its current taxable year, what the tax liability of such company would have been under this section for the preceding taxable year, computed as if such company were subject to such tax. The report to be filed with such commissioner shall be certified, under oath, by a person specified in section one hundred ninety-four of this article. In no event shall the tax imposed under this section or any penalty which may be assessed under this subdivision be separately stated or charged on bills rendered by the oil company to its customers or others located in this state.

(b)(1) If an oil company fails to file a report with the commissioner of taxation and finance as required by paragraph (a) of this subdivision, or files such report after the time prescribed therefor, there shall be imposed by such commissioner for each day of such failure or late filing, a penalty equal to one per centum of the tax imposed under this section for the taxable year to which such report relates. A report filed without the required certification shall be deemed not to have been filed.

(2) If the commissioner of taxation and finance determines that an oil company has violated any of the provisions of paragraph (a) of this subdivision, there shall be imposed by such commissioner a penalty equal to one hundred per centum of the tax imposed under this section for the taxable year during which such violation occurred.

(c) The penalties referred to in paragraph (b) of this subdivision shall be imposed after the commissioner of taxation and finance has rendered a final determination. A final determination may be issued only after the oil company has received a

notice of proposed penalty and has had an opportunity to protest such proposed penalty in a hearing before such commissioner. The notice of proposed penalty must be issued by such commissioner within the following time periods:

(1) where there has been a failure to file a report or where a false or fraudulent report has been filed or where there has been a wilful violation of paragraph (a) of this subdivision with intent to evade the requirements of this paragraph, at any time;

(2) where there has been a late filing of a report, within three years of the filing of the report;

(3) where there has been any violation of any provision of paragraph (a) of this subdivision, within three years of the filing of the report covering the period during which the violation occurred.

(d) Within ninety days after the mailing of the notice of proposed penalty, or one hundred fifty days if the notice is mailed to an address outside the United States, an oil company may file a petition with the commissioner of taxation and finance protesting the proposed penalty: In any hearing before such commissioner, the burden of proof shall be upon the oil company. The assessment of the tax imposed by this section pursuant to article twenty-seven of this chapter shall govern for purposes of such hearing before such commissioner and such assessment is not subject to attack, collateral or otherwise, in such hearing.

(e) Any penalty which is assessed against an oil company pursuant to this subdivision and which has become final shall be paid to the state tax commission, as provided in such assessment, and shall be collected by such commission in the same manner as the tax imposed by this section. A penalty becomes final at the expiration of the time for administrative or judicial review.

(f) The commissioner of taxation and finance shall take testimony and proofs under oath, with reference to any matter within the line of his official duty under this subdivision. A deputy commissioner and such other officials and employees

of the department of taxation and finance, as may be nominated by such commissioner by resolution, may be designated for the purpose of taking such testimony and proofs and a deputy commissioner or other official or employee so nominated may be designated by such commissioner for the purpose of holding any hearing authorized or required under the provisions of this subdivision.

(g) The commissioner of taxation and finance, his agents, deputies, and any other officer or employee of the department of taxation and finance, shall have power to administer oaths, take affidavits and certify acknowledgements in relation to any matter or proceeding in the exercise of the powers or duties of the commissioner under this section and in relation to any written instrument required or permitted to be filed with the commissioner. The commissioner shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct, and to examine them in relation to any matter which he has power to investigate and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance. A subpoena issued under this section shall be regulated by the civil practice law and rules. Such commissioner shall also have the power to require an oil company to submit information in any form which he deems necessary in order to carry out the intent of this subdivision.

(h) Any report required by this subdivision to be filed with the commissioner of taxation and finance shall not be considered to be a report for purposes of any other section of this chapter.

13. All taxes, interest and penalties collected or received by the tax commission under the taxes imposed by this section shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comp-

troller shall require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this section, out of which amount the comptroller shall pay any refunds to which oil companies shall be entitled under the provisions of this section. After reserving the amount required to pay such refunds, the comptroller shall deposit weekly all remaining revenue in the regional transportation operating and capital assistance fund, established by section seventy-two-a of the state finance law, to the credit of the statewide mass transportation operating assistance account therein.

§ 4. Section one hundred ninety-seven of such law, as amended by chapter six hundred thirteen of the laws of nineteen hundred seventy-six, is amended to read as follows:

§ 197. *Payment of tax and penalties*

1. All taxes and fees imposed by this article which are payable to the tax commission shall be due and payable at the time of filing the report required by section *one hundred eighty-two* or one hundred ninety-two of this chapter, or, in case such report is not filed when due, on the last day specified for the filing thereof.

2. Where an application for consent to dissolution, as provided by section one thousand four of the business corporation law, is filed with the tax commission prior to the commencement of any tax year or period, by a corporation subject to tax under articles nine or nine-a of this chapter, such corporation shall not be liable for any tax imposed by said articles for such following year or period (except as may be otherwise provided in section one hundred ninety-one, *subdivision ten of section one hundred eighty-two* and subdivision three of section two hundred nine of this chapter), provided that the certificate of dissolution for such corporation is duly filed in the office of the secretary of state within sixty days after the commencement of such tax year or period and such corporation does not conduct business in such tax year or period.

3. Notwithstanding any other provision of this article, the tax commission may grant a reasonable extension of time for payment of any tax or fee imposed by this article under such conditions as it deems just and proper.

§ 5. Subdivision one of section one hundred ninety-seven-a of such law, as amended by chapter one hundred seventy-four of the laws of nineteen hundred seventy-seven, is amended to read as follows:

1. Every taxpayer subject to the taxes imposed under *sections one hundred eighty-two*, one hundred eighty-four, one hundred eighty-six and one hundred eighty-six-a of this chapter shall make a declaration of its estimated tax for the current taxable year, containing such information as the tax commission may prescribe by regulations or instructions, if such estimated tax can reasonably be expected to exceed one thousand dollars.

§ 6. Section one hundred ninety-seven-a of such law is amended by adding a new subdivision six to read as follows:

6. *This section shall apply to taxable periods of twelve months other than a calendar year by the substitution of the months of such fiscal year for the corresponding months specified in this section.*

§ 7. Paragraph (a) of subdivision one of section one hundred ninety-seven-b of such law, as amended by chapter one hundred seventy-four of the laws of nineteen hundred seventy-seven, is amended to read as follows:

(a) For taxable years beginning on or after January first, nineteen hundred seventy-seven, every taxpayer subject to tax under *section one hundred eighty-two*, one hundred eighty-four, one hundred eighty-six, or one hundred eighty-six-a, shall pay in each such year an amount equal to twenty-five percent of the tax imposed under each of such sections for the preceding taxable year, if such preceding year's tax exceeded one thousand dollars. Such amount shall be paid with the

return or report required to be filed with respect to such tax for such preceding taxable year or with an application for extension of the time for filing such return or report.

§ 8. Section one hundred ninety-seven-b of such law is amended by adding a new subdivision nine to read as follows:

9. The provisions of this section shall apply to taxable periods of twelve months other than a calendar year by the substitution of the months of such fiscal year for the corresponding months specified in such provisions.

§ 9. Subdivision twelve of section 5-105 of the energy law, as amended by chapter eight hundred twenty of the laws of nineteen hundred seventy-six, is amended to read as follows:

12. To assist the attorney general *and the commissioner of taxation and finance* in protecting consumers from abuses in the distribution, sale, handling or transport of energy, energy resources, and energy related devices, installations, and technologies, including the charging of any illegal price or the violation of any state or federal law or regulation.

§ 10. [Appropriation].

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall affect, impair and invalidate the remainder of this act; provided further, however, that the provisions of this act shall not become operative unless and until this state is granted specific authorization to prohibit a "pass through" as provided in subdivision twelve of section one hundred eighty-two of the tax law, as added by section three of this act by a rule or regulation of the federal department or agency; by executive order of the President of the United States; or by act of Congress.

§ 12. This act shall take effect immediately, provided, however, that section three hereof, relating to imposition of a gross receipts tax on oil companies, shall apply to taxable years ending on or after the date on which this act shall have become

a law; sections five, six, seven and eight hereof, relating to such imposition, shall take effect sixty days after the date on which this act shall have become a law.

CHAPTER 272

An Act to amend a chapter of the laws of nineteen hundred eighty as proposed by legislative bill number S. 10188 amending the state finance law relating to establishing the regional transportation operating and capital assistance fund, in relation to a statement of legislative findings and declaration of purpose and making certain technical changes within such chapter and to repeal section twelve of such chapter relating thereto and to amend the tax law, in relation to making certain other technical changes.

Approved June 18, 1980, effective as provided in section 8.

Passed on message of necessity. See Const. art. IX, Section 2(b)(2), and McKinney's Legislative Law Section 44.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Sections one through twelve of a chapter of the laws of nineteen hundred eighty, as proposed by legislative bill number S. 10188 amending the state finance law relating to establishing the regional transportation operating and capital assistance fund, are renumbered to be sections two through thirteen and a new section one is added to read as follows:

Section 1. Statement of legislative findings; declaration of purpose. It is hereby found that public transportation constitutes an irreplaceable segment of the state transportation network which serves all citizens of the state. The viability of public transportation within the statewide transportation network must be maintained in order to provide adequate service to the millions of state citizens who daily rely upon it.

Currently, New York's public transportation system faces a severe financial problem which has reached emergency proportions since the proper financing of public transportation systems in this state is beyond the parameters of the existing state budget and beyond the capabilities of the fare box. Public transportation systems, once an asset, threaten to become a liability.

It is also found that oil companies are currently reaping historically high profits. These increased profits do not result from the application of normal management techniques and strategies which any business uses to maximize profits, but rather result from the market conditions prevailing within the international oil industry, which are artificially inflating the price of petroleum products. In view of the high cost of petroleum, the importance of energy conservation and New York's dependence upon foreign energy suppliers, oil companies have become businesses clothed with a public interest.

It is further found that the economic recession which is currently putting severe pressure on consumers in New York state and the entire nation results in good part from the high price of petroleum products. A cycle is created in which petroleum price increases contribute to growing inflation, which in turn stimulates economic recession.

The current economic recession has the most severe impact on those at the end of the economic spectrum least able to absorb the impact of inflation and most dependent upon mass transit. The same inflationary cycle that necessitates increased monies to maintain the mass transit system also reduces the ability of mass transit users to provide new revenue through major fare increases. It is, therefore, found that providing significant new revenues through major fare increases would have an overall negative impact on the state's economy by imposing a greater financial burden upon those who can least afford it.

It is therefore declared to be the purpose of this act that new funds to aid mass transit shall be provided in a manner that will not contribute to the inflationary spiral. The vast amounts

of petroleum products which are used to transport vital goods and to enable utilities and public transportation systems to provide necessary services indicate that the very well-being of the citizens of this state is directly affected by the price of petroleum. The cost of all petroleum products is high and increasing every day, as evidenced by successive Organization of Petroleum Exporting Countries (OPEC) price increases. It is in the clear public interest to do nothing that will contribute to further increases in the price of petroleum products to consumers.

Accordingly, the legislature hereby determines and declares that it is the public policy of the state to tax the gross receipts of oil companies and, at the same time, to prevent such gross receipts tax from fueling inflation by prohibiting the pass through of such tax to the consumers of this state.

Therefore, it is the intent of the legislature that the gross receipts tax shall cease and terminate if such tax shall be permitted, either by judicial adjudication or by any formal opinion or ruling or in any other manner, to be included either directly or indirectly in the sales price of the products of the oil company.

§ 2. Subdivisions six, eight and thirteen of section one hundred eighty-two of the tax law, as added by such chapter, are amended to read as follows:

6. At the time of filing the return required by this section, each oil company shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed (determined without regard to any extension of time for filing the return). For provisions relating to payment of tax where there have been payments of estimated tax, the provisions of subdivision four of section ~~one hundred ninety-seven~~ *one hundred ninety-seven-b* of this chapter shall be applicable.

8. Any corporation which is subject to tax under section one hundred eighty-three, one hundred eighty-four, one hundred

eighty-five, *or* one hundred eighty-six ~~or one hundred eighty-six-a~~ of this chapter shall not be subject to tax under this section.

13. All taxes, interest and penalties collected or received by the tax commission under the taxes *and penalties* imposed by this section shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this section, out of which amount the comptroller shall pay any refunds to which oil companies shall be entitled under the provisions of this section. After reserving the amount required to pay such refunds, the comptroller shall deposit weekly all remaining revenue in the regional transportation operating and capital assistance fund, established by section seventy-two-a of the state finance law, to the credit of the statewide mass transportation operating assistance account therein.

§ 3. Subdivision one of section one hundred ninety-seven of such law, as amended by such chapter, is amended to read as follows:

1. All taxes and fees imposed by this article which are payable to the tax commission shall be due and payable at the time of filing the report required by section ~~one hundred eighty-two or~~ one hundred ninety-two of this chapter, or, in case such report is not filed when due, on the last day specified for the filing thereof.

§ 4. The first undesignated paragraph of section eleven of a chapter of the laws of nineteen hundred eighty, as proposed by legislative bill number S. 10188 amending the state finance law

relating to establishing the regional transportation operating and capital assistance fund, such section as renumbered by section one of this act, is amended to read as follows:

The sum of two hundred thirty-five million dollars ($235,000,000), or so much thereof as may be available and necessary, is hereby appropriated from the statewide mass transportation operating assistance account of the regional transportation operating and capital assistance fund created pursuant to section seventy-two-a of the state finance law, as added by section ~~one~~ *two* of this act to the department of transportation to supplement the payment of mass transportation operating assistance for the period April first, nineteen hundred eighty, to March thirty-first, nineteen hundred eighty-one, in accordance with the following schedule.

5. Section twelve of such chapter, as renumbered by section one of this act, is repealed and a new section twelve is added to read as follows:

§ 12. (a) If the provisions of paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, as added by section four of this act, prohibiting the inclusion of the tax imposed by this act, directly or indirectly, in the sales price of its products sold in this state by the oil company upon which such tax has been imposed is: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect on the date provided for in subdivision (d) of this section.

(b) Notwithstanding the provisions of subdivision (a) hereof, if, during the judicial or administrative process referred to therein, the court of original instance or any appellate court issues any order, judgment, injunction or stay prohibiting the state of New York from enforcing the provisions of said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, then and in such event, this act shall cease to be in force and effect on the date provided for in subdivision (d) of this section.

(c) If this act ceases to be in force and effect pursuant to the provisions of subdivision (b) hereof and thereafter a court of final appellate review adjudicates the provisions of paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law to be valid, then the provisions of this act shall become operative and be in full force and effect on the tenth day following the entry of the order of remittitur of such appellate court to the court of original instance.

(d) In the event that the provisions of this act shall cease to be in force and effect pursuant to the provisions of either subdivision (a) or (b) of this section, the effective date of such cessation shall be the tenth day after the effective date of (i) the order or judgement, or formal opinion or ruling holding said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law invalid, or (ii) the order, judgment, injunction or stay prohibiting the state of New York from enforcing the provisions of said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, provided, however, that such tax shall continue in full force and effect until such day and all filings of returns and payment of taxes, interest and penalties otherwise required by this act for all periods prior to the cessation of such act shall be timely made and may be enforced as fully and to the same extent as if such act had continued in effect.

(e) If the taxable year of an oil company subject to the tax imposed by such section one hundred eighty-two of the tax law would otherwise have ended subsequent to the date the provi-

sions of this act shall cease to be in force and effect pursuant to the provisions of either subdivision (a) or (b) of this section, then such oil company shall, nevertheless, be subject to the tax for such taxable year, except that such taxable year shall end on the day this act shall cease to be in force and effect.

(f) Any appeal taken within the unified court system of this state from an order, decision or adjudication which prohibits the inclusion of the tax imposed by this act, directly or indirectly, in the sales price of its products sold in this state by an oil company upon which such tax has been imposed shall have preference over all other causes and shall be placed at the head of the calendar of the appellate court in which the appeal is being heard. Such appellate court shall hear arguments on such matter within ten days after the filing of notice of appeal and shall thereafter decide such matter promptly. In the event such court is not in session at the time of the filing of the notice of appeal such court shall convene to hear and decide such appeal within the time limitations set forth in this subdivision.

§ 6. Section thirteen of such chapter, as renumbered by section one of this act is renumbered section fifteen and sections thirteen and fourteen are added to read as follows:

§ 13. Subparagraph four of paragraph (b) of subdivision nine of section two hundred eight of the tax law, as amended by chapter seven hundred thirteen of the laws of nineteen hundred sixty-one, is amended to read as follows:

(4) taxes imposed under this article *and section one hundred eighty-two of this chapter,*

§ 14. (a) The provisions of chapter fifty-seven of the laws of nineteen hundred eighty shall not apply to the tax imposed under section one hundred eighty-two of the tax law and, notwithstanding the provisions of subdivision three of section one hundred ninety-seven-a and of subdivision two of section one hundred ninety-seven-b of the tax law, a declaration of estimated tax for taxable years commencing on or after January first, nineteen hundred eighty and ending before January

first, nineteen hundred eighty-one, with respect to the tax imposed under such section one hundred eighty-two, shall be filed on or before October fifteenth of such year and the estimated tax, with respect to which such declaration is required to be filed, shall be paid in two equal installments as follows: October fifteenth of such year and the next January fifteenth.

(b) For the taxable years or periods ending June thirtieth, nineteen hundred eighty, the payments provided for in subdivision six of section one hundred eighty-two of the tax law and in paragraph (a) of subdivision one of section one hundred ninety-seven-b of the tax law equal to twenty-five percent of the tax imposed by such section one hundred eighty-two for the preceding taxable year, if such preceding year's tax exceeded one thousand dollars, shall be due October fifteenth, nineteen hundred eighty rather than September fifteenth, nineteen hundred eighty.

§ 7. Section fifteen of such chapter, as renumbered by sections one and six of this act, is amended to read as follows:

§ 15. This act shall take effect immediately; provided, however, that section ~~three~~ *four* hereof, relating to imposition of a gross receipts tax on oil companies, shall apply to taxable years ending on or after the date on which this act shall have become a law; ~~sections five, six, seven and eight hereof, relating to such imposition, shall take effect sixty days after the date on which this act shall become a law~~.

§ 8. This act shall take effect upon the same date as such chapter of the laws of nineteen hundred eighty takes effect.

Letter from Eric J. Fygi, Acting General Counsel of the Department of Energy, to the Honorable Hugh L. Carey, Governor of the State of New York—June 10, 1980

Department of Energy
Washington, D. C. 20585

June 10, 1980

Honorable Hugh L. Carey
Governor of New York
Executive Chamber
Albany, New York 12224

Dear Governor Carey:

Secretary Duncan has asked that I respond to your letter of June 10 in which you requested our opinion as to whether aspects of Assembly Bill No. 10609 would be contrary to the Emergency Petroleum Allocation Act of 1973, as amended, or the regulations promulgated by this Department and its predecessors to administer that statute. Your inquiry is, as I understand it, directed to that aspect of the bill ". . . which would make unlawful (under State law) the inclusion by an oil company in the sale price of petroleum sold in (New York) State of an additional gross receipts tax on oil companies, . . ." which tax would be imposed by Assembly Bill No. 10609.

I have reviewed the memorandum you submitted that was prepared by Mr. Saul Heckelman, and I concur with its conclusion that the anti-passthrough provision of this bill would not, if enacted, conflict either with the Emergency Petroleum Allocation Act or with its implementing regulations. The Emergency Petroleum Allocation Act itself displaces State law only to the extent that that statute or its implementing regulations "conflict" with State law, and thus the Allocation Act does not occupy the entire field of petroleum regulation.

The regulations themselves adopt a permissive approach with respect to the passthrough of certain product and nonproduct costs by petroleum refiners and marketers, but the regulatory scheme implementing the Allocation Act mandates neither minimum costs for covered products nor the passthrough of qualified increased costs.

In conclusion I must offer three caveats. First, the time within which I was advised you required a response to this question did not permit the exhaustive analysis of the question you posed. Second, this view of the legal question on which you have requested our advice is not intended to intimate any view of the merits, as a matter of policy, of State statutes intended to impose additional taxes on petroleum refining and marketing activities occurring within the respective States. Finally, the fact that the current regulations under the Emergency Petroleum Allocation Act do not prohibit the provision in Assembly Bill No. 10609 should not be interpreted to suggest that subsequent regulations could not prohibit such a provision.

Sincerely,

/s/ Eric J. Fygi

Eric J. Fygi
Acting General Counsel

Letter from Robert Weeks, Executive Vice President, Marketing and Refining Division, of Mobil Oil Corporation, to John C. Sawhill, Deputy Secretary of Energy—May 16, 1980

May 16, 1980

Hon. John C. Sawhill
Deputy Secretary of Energy
Forestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Sawhill:

We believe the Department of Energy should be concerned with the State of Connecticut's recent enactment of a so-called "gross earnings" tax levied upon the sale of petroleum products by refiners in that state. Both the legislative hearings during which this tax was considered and the final form of the tax itself suggest that Connecticut is attempting to take advantage of DOE regulations and rulings to transfer the burden or a tax based upon Connecticut consumption to out-of-state consumers.

Our concern is further amplified by the fact that other states such as New York, Rhode Island, etc., are considering similar tax proposals.

The Connecticut law provides as follows:

> "Any petroleum company which is engaged primarily in the refining and distribution of petroleum products and distributes such products to wholesale and retail dealers for marketing and distribution in this state shall pay a quarterly tax at the rate of two per cent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products in this state."

Taking advantage of the "equal application" rule (10 C.F.R. 212.83[h[) and the DOE's decision in *State or Oregon* (2 FEA Section 80.616 [1975]), Connecticut also included the following provision with the intent of preventing refiners from passing the tax on gasoline sales entirely through to their Connecticut customers:

> "It is not the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies."

To prevent the pass through of the tax on the sale of so-called "exempt" petroleum products, the Connecticut law provides:

> "No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States."

While state taxation may not generally be of concern to the DOE, we believe action on your part is warranted where a state has so blatantly attempted to use and take advantage of DOE regulations and rulings to transfer to non-Connecticut consumers the burden of Connecticut taxes.

Notwithstanding Connecticut's attempt to disguise the true nature of this tax, it is in effect a wholesale sales tax similar to a percentage motor fuel exercise tax. We believe DOE should take the position that this tax is a cost uniquely associated with the sale of petroleum products in Connecticut as a sales tax. In

the alternative, DOE could act favorably upon requests for exception relief from the equal application rule.

As to Section 13(b) of the Connecticut law dealing with decontrolled products, we believe their attempt to regulate the price of these products is clearly preempted by the Emergency Petroleum Allocation Act. The fact that the price of these products is not controlled at this time does not mean they are not subject to control. In fact, the decision by DOE to remove controls from certain products places Connecticut's action in direct control with federal law and policy.

Because the Connecticut tax could serve as a precedent to other states, we believe it is important for DOE to take a position on the concerns expressed in this letter.

I would appreciate a meeting with you to discuss these concerns further.

Very truly yours,

/s/ROBERT G. WEEKS

Robert G. Weeks

Letter from Lynn R. Coleman, General Counsel of the Department of Energy, to Robert Weeks, Executive Vice President, Marketing and Refining Division, of Mobil Oil Corporation—July 1, 1980

Mr. Robert Weeks
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017 July 1, 1980

Dear Mr. Weeks:

This is in response to your letter to the Deputy Secretary regarding the State of Connecticut's "gross earnings" tax.

You are correct that generally this Department does not become involved in matters of State taxation of petroleum products.

Any attempt by a State in structuring its tax to capitalize upon a particular regulatory provision in our price regulations is not likely to be ultimately successful. Not only will all the price regulations expire by October 1981, but also the life of any particular regulatory provision may well be shorter. Indeed, the Economic Regulatory Administration has just proposed elimination of the equal application rule, which would eliminate the proscription against oil companies passing allowable tax costs through where they are incurred.

We do not agree with your contention that Section 13(b) of the Connecticut law is preempted by the Emergency Petroleum Allocation Act (EPAA). By its terms that section only applies to petroleum products "exempt" from the EPAA, which we take to mean currently decontrolled under that Act. We do not read the EPAA as preempting the entire field of price and allocation regulaton of crude oil and petroleum products. Rather the Federal regulations supersede State law only where there is a legal conflict between them.

Sincerely,

/s/ Lynn R. Coleman

Lynn R. Coleman
General Counsel

Excerpt from Affidavit of Norman Goldberg, Senior Vice President, Marketing, of Amerada Hess Corporation—August 5, 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

Docket No. 80-CV-570 (NPM)

AMERADA HESS CORPORATION,

Plaintiff,

v.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, constituting the NEW YORK STATE TAX COMMISSION ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK; and JAMES L. LaROCCA, COMMISSIONER OF THE NEW YORK STATE ENERGY OFFICE,

Defendants.

AFFIDAVIT IN SUPPORT OF AMERADA HESS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY }
COUNTY OF MIDDLESEX } ss.:

NORMAN GOLDBERG, being duly sworn, deposes and says:

* * *

6. There are approximately 50 companies which distribute petroleum products in competition with Hess in states outside New York, but which—unlike Hess—do not do business in New York and are thus not subject to New York's additional franchise tax. In my judgment, because of (a) the intense competition which Hess faces in the markets in which it sells its petroleum products, and (b) the fact that Hess competes against companies outside of New York which do not do business in New York, it is highly unlikely that Hess will be able to recoup the full cost of New York's additional franchise tax by raising its petroleum product prices to customers outside of New York. If Hess were to attempt to do so in any substantial degree, it would be placed at a serious price disadvantage vis-a-vis those competitors which do not do business in New York (and thus do not have New York's franchise tax as an added element of their costs), thereby causing Hess to lose customers and sales.

/s/ Norman Goldberg

Sworn to before me this
5th day of August, 1980

/s/ Lucille E. Rodecker